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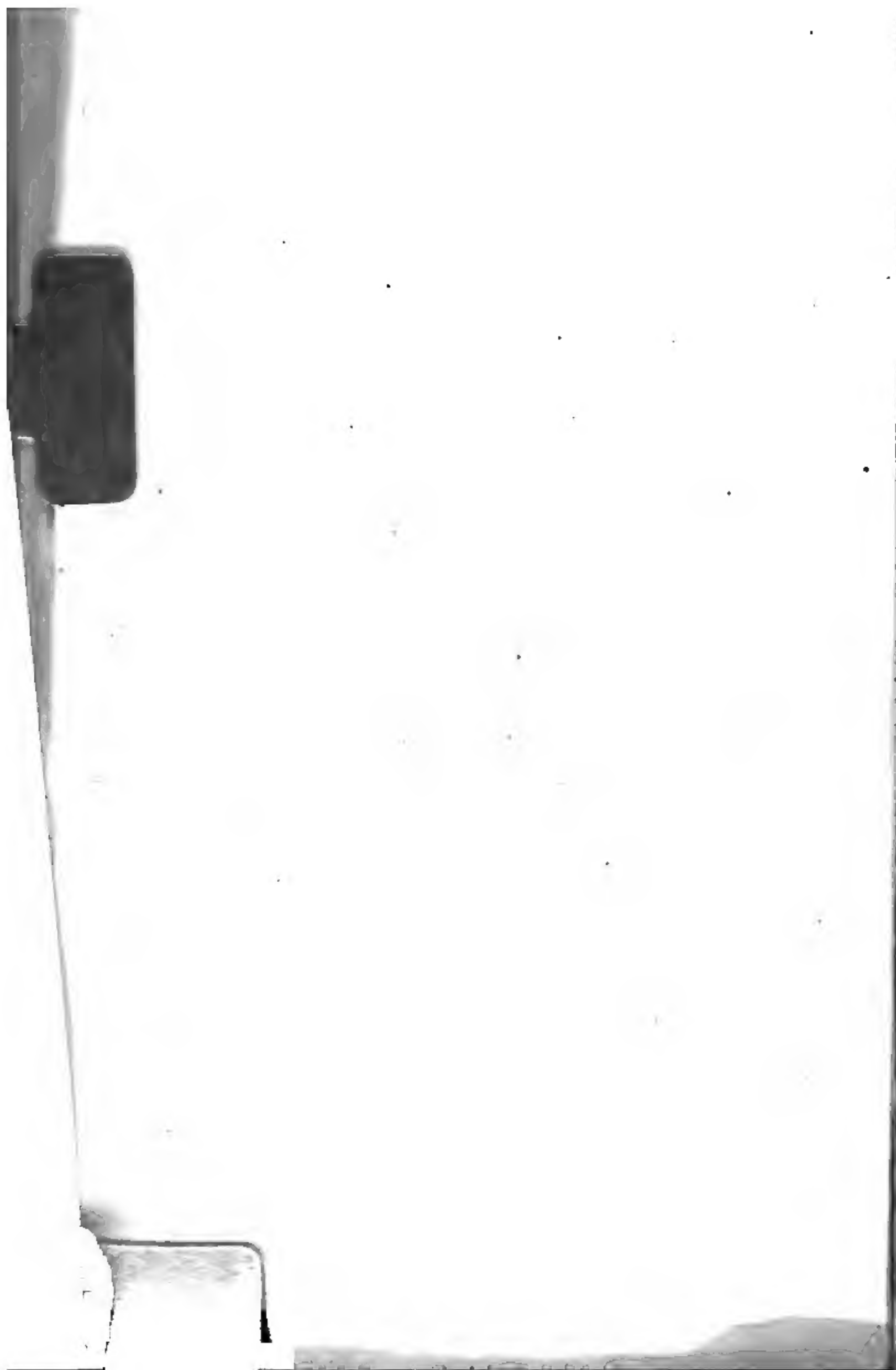
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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. XVII.

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JUDGES
OF
THE SUPREME COURT OF JUDICATURE
OF
THE STATE OF NEW-YORK,
DURING THE TIME OF
THE SEVENTEENTH VOLUME OF THESE REPORTS.

AMBROSE SPENCER, Esq., *Chief Justice.*
WILLIAM W. VAN NESS, Esq.
JOSEPH C. YATES, Esq.
JONAS PLATT, Esq.
JOHN WOODWORTH, Esq.

Attorney General.

THOMAS J. OAKLEY, Esq.

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the eleventh day of October, in the forty-fifth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. XVII."

In conformity to the act of Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

GILBERT L. THOMPSON,
Clerk of the Southern District of New-York.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, 1819, IN THE FORTY-FOURTH YEAR OF OUR
INDEPENDENCE.

BROWN *against* CHILDS, Gentleman, one of the At-
torneys, &c.

FOOT, for the defendant, moved to set aside the default entered in this cause and all subsequent proceedings, on the ground of irregularity. The suit was commenced by a *capias ad resp.* The declaration and notice and rule to plead were served, by putting the same up in the clerk's office, as in ordinary cases, there being no notice of any attorney being employed by the defendant, or that he intended to defend the suit.

In suits against attorneys, whether the same be commenced by writ, or by bill, the service of the declaration and notices of subsequent proceedings must be personal.

Foot contended, that the defendant, being himself an attorney of the court, was entitled to be *personally* served with all notices, &c.

Clark, contra, insisted, that since the act (1 N. R. L. 416. sess. 36. ch. 48. s. 12.) allowed attorneys and other officers of the court to be arrested and held to bail on *mesne* process, they were put on the same footing with ordinary persons. In the cases in which the court had decided that the service must be personal on the attorney, the proceeding was by *bill*, not by *writ*. (*Bridgeport Bank v. Sherwood*, 16 Johns. Rep. 43. *Backus v. Rogers*, 8 Johns. Rep. 346.)

**Per Curiam*. When an attorney is sued by *writ*, he is entitled to personal service of all notices, &c. in the same

[* 2]

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manner as if he was sued by *bill*. We see no reason for any distinction in this respect. We should grant the motion, if a term had not intervened since the default was entered. The application on the part of the defendant ought to have been made at the last term, and we must, therefore, deny the motion.

Motion denied

HALLENBACK *against* WHITAKER.

An affidavit taken before a commissioner, an attorney of this court, and who was a partner in business with the attorney of the defendant, was allowed to be read, as he was not named on the record as an attorney in the cause.

T. SEDGWICK, for the defendant, moved for judgment as in case of nonsuit, for not proceeding to trial, &c.

Townsend, contra, objected that the affidavit, on which the motion was founded, was taken before an attorney of the court, as commissioner, who was a partner of the defendant's attorney, in the practice of the law as attorneys. He cited *Taylor v. Hatch*, (12 Johns. Rep. 340.)

Per Curiam. The commissioner, Mr. *Matthews*, before whom the affidavit was taken, does not appear as the attorney in this cause, as his name is not on the record. Though he may be a partner with the defendant's attorney, in the profits of his business, as he is not the attorney on record, in this cause, we think the case does not come within that of *Taylor v. Hatch*. The objection cannot, therefore, be allowed.

[* 3]

*SQUIRES and Wife *against* MALLORY.

Where the defendant pleads a special plea, to which the plaintiff replies, and takes issue, and gives notice for trial at the next circuit, the defendant cannot, though within twenty days after service of the plea, amend it, of course, without costs, under the 8th rule of April, 1796.

THIS was an action of debt, on a judgment in the Court of C. P. of *Genesee* county, to which the defendant pleaded satisfaction, setting forth certain proceedings in the suit material to the plea; among others, the issuing of the *capias ad respondendum* in the original action, which was alleged to have been sued out on the 5th of *February*, 1819. The plea was served on the 13th or 14th of *June*, and a replication was put in on the 15th of *June*, taking issue on the averment in the plea, and denying, that the *capias ad respondendum* issued on the 5th of *February*, 1819. A notice of trial for the next *Genesee* circuit, was, at the same time, served on the defendant's attorney. On the 1st of *July*, and within twenty days after service of the plea, the defendant's attorney, discovering his mistake, amended his plea, by stating the suing out of the *capias ad respondendum* to be on the 6th of *February*, 1819,

and served an amended plea, accordingly, on the plaintiff's attorney, who, disregarding the amended plea, took an inquest by default, on the issue as joined, at the circuit, on the 2d of July. The defendant's attorney, conceiving it to be irregular, declined to appear on the trial.

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Parker, for the defendant, now moved to set aside the inquest taken at the circuit, and all subsequent proceedings, with costs.

T. Sedgwick, contra.

Per Curiam. Unless there was a demurrer to the plea, the defendant could not have amended, under the 8th rule of *April* term, 1796. Here the plaintiff had taken issue on the plea, and the defendant could not, under the rule, amend, as of course, without costs. The motion must be denied. (a)

Motion denied.

(a) The only authority for amending, of course, is the 8th Gen. Reg. of *April* Term, 1796. Under this rule, a plea, unless it is demurred to, cannot be amended; and even then, a new plea cannot be added. *Benedict v. Ripley*, 5 *Corwen*, 37. *Wiley v. Moore*, 2 *Wendell*, 259. *Silver v. North*, 18 *Johns. Rep.* 310. *Griswold v. Sedgwick*, 1 *Wendell*, 126.

*THE UNITED STATES OF AMERICA against LATHROP.

[* 4]

THIS was an action of debt brought in this court, to recover a penalty of 150 dollars, under the act of Congress, passed the 2d of *August*, 1813, (13 *Cong. sess.* 1. ch. 38.) entitled, "An act for laying duties on licenses to retailers of wines, spirituous liquors, and foreign merchandise," for selling, by retail, spirituous liquors, without license, contrary to the provisions of the said act.

The defendant pleaded to the jurisdiction of this court, alleging, that, under the constitution and laws of the *United States*, the action ought to have been brought in the District Court of the *United States*, for the southern district of *New-York*, and not in this court.

*The plea was as follows: "That this court here ought not to take, nor will take, cognizance of the plea aforesaid, because he, the said *D. Lathrop*, says, that the said state of *New-York* is one part, or member, of the said *United States*, in the said declaration mentioned, and within and under the constitution, laws, and government of the same: And that the said *United States* are divided into districts, and the state of *New-York* composes two of the said districts, for the more convenient

A state court has no jurisdiction of criminal offences against the *United States*, nor of the penal laws of the *United States*; nor can such jurisdiction be conferred upon them by an act of Congress.

An action for the penalty incurred by selling spirituous liquors, without a license, contrary to the act of the 2d of *August*, 1813, (13th *Cong. 1st sess.* ch. 38.) cannot, therefore, be brought in this court.

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transaction of business in the courts of the *United States*, one of which said two districts is called the Southern District of *New-York*, and within which said last mentioned district, the said county of *Albany* is contained: And the said *D. L.* further says, that within the said Southern District of *New-York*, there is, and at the time of the exhibition of the bill of the said *United States* in this behalf, and long before that time, was, a Circuit Court of the *United States*, called a District Court, holden for the Southern District of *New-York*, before the judges assigned to hold the said court, in the said Southern District of *New-York*: And that all and singular, pleas, suits, or actions, for penalties and forfeitures incurred under the laws of the *United States*, to which the *United States* are parties, arising within the said Southern District of *New-York*, are, and at the time of the exhibition of the said bill were, and of right ought to be, pleaded and pleadable within the said District Court of the *United States*, holden in and for the said Southern District, before the judges thereof, for the time being; and not in the court before the justices of the people of the state of *New-York*, of the Supreme Court of Judicature of the same people; and that he, the said *D. L.*, at the time of exhibiting the said bill, and before, was, and from thence hitherto has been, resident and commorant within the same Southern District of *New-York*, that is to say, at the city of *Albany*, in the county of *Albany* aforesaid, where the said offence, charged in the said declaration, is alleged to have been committed; and this he is ready to verify to the said court here; and wherefore, since the cause of action aforesaid arose within the said Southern District of *New-York*, within and under the government, constitution, and laws of the said *United States*, and for penalties and forfeitures incurred under the laws of the *United States*, and to which the said *United States* are a party, and of which the said District Court, for the said Southern District of *New-York*, *has exclusive original cognizance, the said defendant prays judgment, if the said Supreme Court of Judicature of the people of the state of *New-York*, before the justices of the said people, holden under and in virtue of the laws and constitution of the state of *New-York*, here, will, or ought, to have further cognizance of the plea aforesaid." To this plea there was a demurrer and joinder.

Fisk, in support of the demurrer to this plea, contended, that this court had jurisdiction of the cause. By the act of Congress, (13 Cong. sess. 1. ch. 38. sect. 5.) passed August 2, 1813, and the act, (13 Cong. sess. 3. ch. 100.) passed March 3, 1815, (*Vid. Colvin's ed. of Laws of U. S. vol. 4. p. 611. and 854.*) jurisdiction is given to the state courts, who are authorized to take cognizance of all complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures, arising and payable under the act of August 2, 1813,

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or any act of Congress, to be passed for the collection of any direct tax or internal duties of the *United States*. By the judiciary act of the *United States*, (1 Cong. sess. 1. ch. 20. sect. 9. 11.) the district courts of the *United States* have cognizance concurrent with the state courts, of all suits at common law, when the *United States* sue, and the matter in dispute amounts to the sum or value of 100 dollars; and the circuit courts of the *United States* have original cognizance concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum or value of 500 dollars, and the *United States* are plaintiffs or petitioners. What was the true understanding of the second section of the third article of the constitution of the *United States*, relative to the judicial power, may be seen by the exposition given, at the time, by one of the members of the convention who framed the constitution, and who was, also, a learned and able jurist. (Here the counsel read from the *Federalist*, No. 82. of the Letters of *Publius*, written by General *Hamilton*.) And, in conformity to this construction, it had been the uniform practice, since the adoption of the constitution of the *United States*, for suits to be brought by the *United States* in the courts of the several states. In the case of the *United States v. Dodge*, (14 *Johns. Rep.* 95.) which was an action of debt, on a bond given by the defendant, for the payment of *duties* to the collector of the district of *Champlain*, pursuant to the act of Congress of *March 2*, 1799, this court said, that they could not see how any doubt could exist on the question of jurisdiction, and, accordingly, gave judgment for the plaintiffs. Where there has been a contemporary exposition of the constitution practised and acquiesced under for a period of years, and from the very commencement of the judicial system, it fixes the construction, which ought not, afterwards, to be questioned or disturbed. (*Stuart v. Laird*, 1 *Cranch*, 299.)

I. Hamilton, contra. By the constitution of the *United States*, (*Art. 3. s. 1.*) it is declared, that the judicial power of the *United States* shall *be vested in a Supreme Court, and in such inferior courts as Congress shall, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, are to hold their offices during good behavior; and they are to receive, at stated times, a *compensation* for their services, which is not to be diminished during their continuance in office. The *second* section prescribes and defines the extent of the judicial power. The *sixth* article declares, that the constitution and laws of the *United States*, made in pursuance thereof, and all treaties, &c., shall be the supreme law of the land, by which the judges in every state are to be bound: and the 8th section of the first article declares, that Congress shall have power to constitute tribunals inferior to

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the Supreme Court. By the 9th and 10th articles of the amendments to the constitution, it is declared that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and that the powers not delegated to the *United States*, by the constitution, nor prohibited by it, are reserved to the states respectively, or to the people.

By the constitution of this state, (*Art. 24, 25.*) the judges are to hold their offices during good behavior, or until they shall have respectively attained the age of sixty years; and they cannot, at the same time, hold any other office, except as delegates to Congress on special occasions.

Have not the people of the *United States*, by the constitution, made an express grant of the *whole judicial* power? Is not that grant exclusive? Can Congress vest it elsewhere?

In the case of *Marbury v. Madison*, (1 *Cranch*, 137—174.) Chief Justice *Marshall*, in delivering the opinion of the court, says, it was not the intention of the constitution to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body. "If Congress," says he, "remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance." This language may be applied with great force to the present case. If Congress remains at liberty to vest the judicial power of the *United States* in the state courts, which power the constitution has declared shall be vested in the courts of the *United States*; if Congress is at liberty to declare that the state courts shall have jurisdiction of causes where the *United States* is a party, when the constitution has declared that the jurisdiction of the *United States* courts shall extend to controversies to which the *United States* is a party,—then, in the language of Chief Justice *Marshall*, the distribution of jurisdiction made by the constitution is form without substance. And further, to use the language of that learned judge, "affirmative words are often, in their operation, negative of other objects than those affirmed; and, in this case, a negative or exclusive sense must be given to them, or they have no operation at all."

In the case of *Martin v. Hunter's Lessee*, (1 *Wheat. Rep.* 305—328.) *Story*, J., who delivered the opinion of the court, says, "that the language of the article (*Art. 3. Const. of U. S.*) throughout, is manifestly designed to be *mandatory* on the legislature." "If then," he says, "it is the duty of Congress to vest the judicial power of the *United States*, it is a duty to vest the *whole judicial power.*" "Congress cannot vest any portion of the judicial power of the *United States*, except in courts ordained and established by itself; and if, in any of the cases

enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on state courts) could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power *shall be vested*, would be disobeyed. It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the *United States*, and of which the Supreme Court cannot take original cognizance." "As to cases arising under the *constitution, laws, and treaties*, of the *United States*, the states could not, ordinarily, possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts, previous to the adoption of the constitution, and it could not, afterwards, be directly conferred upon them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the *United States*." (p. 35.) We have, in this case, the judgment of the Supreme Court of the *United States* on this very question.

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Wherever the cases upon which the jurisdiction attaches, grow out of the constitution of the *United States*, the federal courts have exclusive jurisdiction; and the reason assigned is, that, in such cases, there was no previous authority in the state courts, for the cases did not exist; and, of course, that amendment which reserves to the states, or to the people, the powers not granted by the constitution, has no application. (1 *Binney's Rep.* 143.) "It seems scarcely to admit of controversy," says Mr. *Hamilton*, in the *Federalist*, (No. 80.) "that the judicial authority of the Union ought to extend to these several descriptions of cases: 1st. To all those which arise out of the laws of the *United States*, passed in pursuance of their just and constitutional powers of legislation: 2d. To all those which concern the execution of the provisions expressly contained in the articles of union: 3d. To all those in which the *United States* are a party," &c.

A corporation aggregate cannot litigate in the courts of the *United States*, unless in consequence of the character of the individuals who compose the body politic, and which character must appear, by proper averments, on the record. (5 *Cranch*, 57.) Why should not this court apply the same rule to the *United States*; and refuse permission to them to litigate here, unless bound by the constitution of the *United States* to hear them? The courts of the *United States* consider their powers limited by the constitution, and the right of the plaintiff to sue must appear on the record. (1 *Cranch*, 343. 2 *Cranch*, 9. 126. 5 *Cranch*, 303.) *Marshall*, Ch. J., (*case of Bolman and Swartwout*, 4 *Cranch*, 97.) says, "the state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an *appeal* lies from their judgment to this court; they are not inferior courts, because they emanate from

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a different authority, and are the creatures of a distinct government." Mr. *Hamilton* says (*Federalist*, No. 81.) that the power of constituting *tribunals inferior to the Supreme Court*, was intended to enable the national government to institute or authorize, in each state, or district of the *United States*, a tribunal competent to the determination of matters of national jurisdiction within its limits ;" and he states the reasons why the state courts should not be made use of for this purpose. In this case, the right arose under a law of Congress. It did not, and could not, have existed previous to the constitution of the *United States*.

Again ; if the court should have any doubts on the question, they ought to decide in favor of the defendant, who would, otherwise, be without remedy : for if the decision should be in favor of the plaintiffs, no writ of error would lie. The Supreme Court of the *United States* have no jurisdiction upon a writ of error to a state court, if the decision of the state court is in favor of a privilege claimed under an act of Congress. (*Gordon v. Caldcleugh*, 3 *Cranch*, 268.) Even the legislature of a state cannot determine the jurisdiction of the courts of the *United States*. (*The United States v. Peters*, 5 *Cranch*, 115—136.)

This same question has been brought before the courts of several of the states, and, after solemn argument, and the most mature deliberation, they have decided, that the state courts have no jurisdiction. (The counsel here referred to the following cases : *The State of Maryland v. Thomas Rutter*, and the opinion of Judge *Bland*, 12 *Niles's Weekly Register*, April 19 1817, p. 115. 377. *Ex parte Rhodes*, opinion of Judge *Cheeves*, *South Carolina*, 12 *Niles's Weekly Register*, 265. *Commonwealth of Pennsylvania v. Rosloff*, 12 *Niles's Weekly Register*, 139, April 26, 1817. *Almeida's case*, Judge *Hanson's* opinion, 12 *Niles's Weekly Register*, 231, June 7, 1817. *United States v. Campbell*, opinion of Judge *Tappan*, of *Ohio*, 10 *Niles's Weekly Register*, 405, August 17, 1816. *Commonwealth of Virginia v. Feely*, MS. *Jackson v. Rose*, decided before the nine judges of the *General Court of Virginia*, November 11, 1813, MS.) These cases conclusively show, that Congress has no power to give to a state court jurisdiction over cases of a penal or criminal nature, arising under the laws of the *United States*. The case of the *United States v. Dodge*, in this court, is very different from the present. It was an action of debt, on a bond for the payment of duties. In *Scoville v. Canfield*, the court said, that the penal acts of one state have no operation in another state, nor would they enforce the criminal laws of another state. In the **Trustees of Randall v. Rensselaer*, (1 *Johns. Rep.* 94.) this court decided, that they would take no notice of the revenue laws of another country.

The observations in the *Federalist*, (No. 82.) which have been read, amount to no more than this : that where the state

courts had pre-existing power to take cognizance of the case, before the constitution, they might still exercise that power ; but that where the case arises out of the constitution or laws of the *United States*, the state courts have no jurisdiction.

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Fisk, in reply, reiterated the arguments before stated, and said, that he relied much on the *practical* construction given to the constitution. In the case of *Martin v. Hunter's Lessee*, Judge *Johnson*, though he acquiesced in the judgment of the court, did not concur in the reasoning of the judge who delivered it. He said that the plain and obvious meaning of the word "*shall*" is, that it is in the future tense, and has nothing imperative in it.

SPENCER, Ch. J., delivered the opinion of the court. The plea demurred to can only be supported on the ground, that, by the constitution of the *United States*, no state court can take cognizance of any suit in behalf of the *United States*, for penalties or forfeitures. The whole case, then, depends on the provisions of the constitution of the *United States*.

By the first section of the third article, it is provided, that "the judicial power of the *United States* shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." The second section of the same article declares, that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the *United States*, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same *state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

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The act of Congress under which this suit is brought, was passed at the first session of the 13th Congress, (ch. 38.) After declaring the forfeiture for noncompliance with its provisions, it proceeds to enact, that for the recovery of all fines, penalties, and forfeitures, incurred under it, suits may be prosecuted and maintained, in the name of the *United States*, before any court of the state having jurisdiction in like cases, where the cause of action shall arise or accrue more than fifty miles distant from the nearest place by law established for the holding a district court, within the district in which the same shall arise or accrue.

The question which we are called upon to decide involves considerations of great delicacy and magnitude, and on which several very enlightened tribunals have held different opinions. I cannot doubt, that in some of the enumerated cases, to which

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the constitution declares the judicial power of the *United States* shall extend, the courts of the *United States*, strictly speaking, have exclusive jurisdiction; and that in others of these enumerated cases, the courts of the several states have a concurrent jurisdiction. I entirely concur in the opinion delivered by Mr. Justice *Story*, in the case of *Martin v. Hunter's Lessee*, (1 *Wheat. Rep.* 323.) that the language of the constitution is imperative, "that the judicial power of the *United States* shall be vested," "and that it shall extend," for the reasons offered by that learned judge; but this does not necessarily divest the state courts of jurisdiction in all those cases to which their jurisdiction extended, before the adoption of the constitution. The vesting of jurisdiction in newly-constituted courts, without any words of exclusion of the jurisdiction possessed by other courts before, does not, *ex vi termini*, oust those courts of jurisdiction; unless, indeed, there should be an incompatibility in the exercise of the same powers, by distinct and independent tribunals; in such case a negative might be implied from the very nature of the case.

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*It is not eulogy to say, that, perhaps, there never was a human production more profoundly considered, by an assemblage of the most distinguished men, than this great national pact, which has secured to the people of the *United States* such innumerable blessings. Many members of that illustrious convention were eminent lawyers, conversant with the practice, organization, and proceedings of the courts of the several states; and we are, therefore, authorized to conclude, that in vesting the judicial power of the *United States*, they would avoid every thing leading to confusion or derangement in the proceedings of the state courts; and, if I am not greatly mistaken, it will appear, that a denial to the state courts of a concurrent jurisdiction with the courts of the *United States*, in some of the specified cases, and an imposition upon them of jurisdiction in others, would, in the one case, lead to the most absurd and extraordinary results, and, in the other, to a violation of fundamental principles.

There were several great objects in the view of the convention in adjusting the judiciary system. The government was invested with the powers of peace and war; they assumed the national debt, and became liable for future national engagements; they were charged with the common defence of every portion of the empire; the power of fulfilling these obligations required the collection of a revenue, in the shape of taxes, duties, imposts, and excises; and to preserve the public peace, and fulfil the public faith, it was all important that the power to do both should be enjoyed and exercised by the government itself. It would have been unwise and unsafe to depend on the judiciary of the several states, over whom the *United States* had no control, for the exposition or execution of the laws of

the *United States*. It would have been incompatible with the stability or permanency of the government itself.

It was necessary to guard against the probable partialities and prejudices incident to the state courts, in legal controversies between citizens of different states. Indeed, the declaration of the extent of the judicial power of the *United States*, in all the specified cases, was justified by the great interests of the nation. It is not, however, necessary that *the courts of the *United States* should have exclusive primary jurisdiction in all the enumerated cases. A subsequent part of the third article of the constitution declares, "that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases, before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations, as the Congress shall make."

The requisitions of the constitution are satisfied, if the judicial power of the *United States* is ultimately vested in a court constituted by them, without excluding the state courts from a concurrent jurisdiction; and from whose decisions a right of appeal, both as to law and fact, is secured. I cannot but conclude, on this branch of the subject, that inasmuch as there is no express negation of jurisdiction to the state courts, in the specified cases, their jurisdiction is not taken away, except as to such of the cases as they did not before hold cognizance of, and such as, from the nature of the jurisdiction, they could not hold cognizance of, from the incompatibility between the powers granted to the courts of the *United States*, and a reservation of any portion of the same powers to the state courts.

This conclusion derives support from another part of the constitution. The sixth article provides, "that this constitution, and the laws of the *United States* which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the *United States*, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding;" and the constitution further requires, that judicial officers, both of the *United States* and of the several states, shall be bound, by oath or affirmation, to support the constitution.

It is evident that the framers of the constitution contemplated, that the state courts might entertain questions involving the consideration and construction of the constitution and laws of the *United States*, and treaties made under their authority, and yet the judicial power of the *United States* *extends "to all cases in law or equity arising under the constitution, the laws of the *United States*, and treaties made under their authority." It seems to me, that if we regard the whole

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instrument, as we are bound to do by every sound rule of construction, it cannot be doubted that the constitution never intended to negate the pre-existing jurisdiction of the state courts.

Perhaps it was unnecessary to discuss a proposition, which I do not learn has ever been doubted in any of the courts; but it came within the range of observations called for by the case.

How far Congress can confer power or jurisdiction upon the state courts, and whether those courts, if the act was silent upon the subject of jurisdiction, could take cognizance of actions for penalties and forfeitures incurred under the laws of the *United States*, remains to be considered. We have seen, that *the judicial power of the United States is to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.*

On this clause of the constitution, we have the direct opinion of the Supreme Court of the *United States* in the case already cited, of *Martin v. Hunter's Lessees*, (1 *Wheat. Rep.* 330.) that "*Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.*" Indeed, it appears to me too plain for discussion, that the expression in the constitution, "and in such inferior courts as the Congress may, from time to time, ordain and establish," can have no reference to the courts established by the respective state legislatures: the conferring of jurisdiction on such courts, is not to ordain and establish them; and in no sense can the state courts become the inferior courts intended in the constitution. Where, then, it may be asked, is the authority in the constitution to invest the state courts with jurisdiction of causes, which they did not enjoy concurrently before the adoption of the constitution? On this point, also, we have the opinion of the Supreme Court of the *United States*. They say, (1 *Wheaton*, 337.) "no part of the criminal jurisdiction of the *United States* can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction *is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction, independent of national authority, that they can now, constitutionally, exercise a concurrent jurisdiction."

It cannot be doubted, that a pecuniary penalty for a violation of, or nonconformity to, an act of Congress, is as much a punishment for an offence against the laws, as if a corporal penalty had been inflicted; and, as regards crimes and offences, made so by legislative enactment, the government of the *United States* stands in the same relation to the state governments, as any foreign government; and it is a fundamental maxim, that the courts of one sovereignty will not take cognizance of, nor enforce the penal code of, another. Thus,

in the case of *Scoville v. Canfield*, (14 *Johns. Rep.* 339.) we held, that we would not enforce a penal statute of *Connecticut*, on the broad principle, that the courts of this state will not carry into effect the penal laws of another state. The act of Congress, in this case, undoubtedly reaches the offender, but this court cannot touch him.

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The act of Congress establishing the judicial courts of the *United States*, passed the 24th of *September*, 1789, I consider as a true exposition of the constitutional provision, with respect to the concurrent jurisdiction of the state courts, and the exclusive jurisdiction of those of the *United States*. When we call to mind, that it is among the first acts of the first Congress, held under the constitution, and that many of the leading members of the convention were, also, members of that Congress, we cannot but regard it as entitled to the most profound respect, in settling the question of concurrent, and exclusive, jurisdiction.

The 9th section of this act gives the District Courts of the *United States* cognizance, exclusively of the courts of the several states, of all crimes and offences that shall be cognizable under the authority of the *United States*, and exclusive original cognizance of all civil causes of admiralty, and maritime jurisdiction, and of all suits for penalties and forfeitures incurred under the laws of the *United States*, and cognizance, concurrent with the courts of the several states, of all causes where an alien sues for a *tort* only, in *violation of the laws of nations, or of a treaty of the *United States*, and of all suits at common law, where the *United States* sue, and the matter in dispute amounts to 100 dollars, and jurisdiction, exclusively of the state courts, of all suits against consuls and vice-consuls. The 11th section vests the Circuit Court of the *United States* with original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds 500 dollars, and the *United States* are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen where the suit is brought and a citizen of another state; and exclusive cognizance of crimes and offences.

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It will be perceived, that this act, throughout, makes the distinction between those cases of a civil nature, and of which the state courts had, or would have had, cognizance, independently of the constitution, and such as originate under the laws of Congress. The jurisdiction of the state courts is in no instance excluded where they had a pre-existing jurisdiction, except in those cases of a national character, such as admiralty and maritime cases, and suits against ambassadors and other public ministers, consuls, and vice-consuls; but the jurisdiction of the state courts is excluded in cases of crimes and offences cognizable under the authority of the *United States*; and in

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cases of suits for penalties and forfeitures incurred under the laws of the *United States*.

It cannot be supposed that there existed any distrust of the state courts when the act of 1789 was passed. On the contrary, if, as is contended by some distinguished jurists, it is in the power of Congress to vest the cognizance of all the cases enumerated in the constitution, exclusively in courts established by Congress, (a proposition on which I give no opinion,) it will at once be seen, that the act of 1789 left a great mass of jurisdiction in the state courts untouched.

In whatever light, then, this question is considered, I am fully of the opinion, that this court has no jurisdiction of the criminal offences, or penal laws of the *United States*; and that it is not competent to Congress to confer jurisdiction; *and that, therefore, the defendant must have judgment on the demurrer.

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PLATT, J., dissented. The question of jurisdiction in this cause involves the construction of the constitution of the *United States*, the validity of an act of Congress, and the inherent rights of state sovereignty. I approach the subject with unfeigned diffidence; but, in performing the unpleasant duty of dissenting from all my brethren on this occasion, I feel some consolation in the reflection, that if my opinion be *erroneous*, it will be *harmless* also.

By the act of Congress, entitled, "An act laying duties on licenses to retailers of wines, spirituous liquors, and foreign merchandises," passed the 2d day of *August*, 1813, it is enacted, that "all fines, penalties, and forfeitures which shall be incurred by force of this act, shall and may be sued for and recovered in the name of the *United States*" &c.; "and where the cause of action, or complaint, shall arise, or accrue, more than fifty miles distant from the nearest place by law established for the holding of a district court, within the district in which the same shall accrue, *such suit and recovery may be had before any court of the state, holden within the said district, having jurisdiction in like cases.*"

The attorney for the *United States* has brought an action of debt in this court, for a penalty accrued under this act of Congress; and the question is, whether we can rightfully hold jurisdiction of the cause?

The constitution of the *United States* (art. 3. sec. 1.) declares, that "the judicial power of the *United States* shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

Much criticism has, on various occasions, been bestowed on the words "*shall be vested*," as used in this article. I admit that these words are *imperative*; but, in my judgment, they are used here, generally, to mark out, and define one of the

three great co-ordinate departments of *the government; and without any view to the questions of *exclusive* or *concurrent* jurisdiction between the several states, and the *United States*. The constitution ordains, that "all legislative powers herein granted *shall be vested* in a Congress of the *United States*," &c.; that "the executive power *shall be vested* in a president," &c.; and that "the judicial power *shall be vested* in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." The Congress, the president, and the Supreme and inferior courts of the *United States*, are thus appointed as the organs for exercising all the functions of national sovereignty. The constitution then assigns, and limits the powers intended to be conferred on each of these departments. There is no doubt, that the judicial power of the federal government, whatever it may be, is vested in, and can only be exercised by, the federal courts, whose tenure is fixed, whose compensation is regulated, and whose responsibility is secured, in the constitution of the *United States*.

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By the 2d section of the 3d article it is declared, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the *United States*, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty, and maritime jurisdiction; to controversies to which the *United States* shall be a party; to controversies between two or more states; between a state and citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." The words, "the judicial power *shall extend to*, &c. mean, that the federal organs of judicial power *shall *have jurisdiction of*, &c. Here it is important to note a distinction between *legislative* and *judicial* power: *Jurisdiction*, or *jus dicere*, in our courts, implies nothing *exclusive*; but *legislation*, or *jus facere*, often implies *exclusive* power. To make law is an exercise of the will, in establishing a rule of action; to expound, and administer the law, is the exercise of judgment, and legal science in the application of that rule.

The powers of Congress "to regulate commerce with foreign nations," and "to make war," are, in their nature, *exclusive*; because they are utterly repugnant to, and irreconcilable with, the exercise of a concurrent power of willing, or legislating, on

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the same subjects. But whether the exercise of *judicial* power, in any of the specified cases, be *exclusive* or *concurrent*, the terms of that article of the constitution are equally satisfied. In either case, the judicial power of the *United States* "extends to" those cases; and, looking at that section alone, there is no *necessary* repugnance, or inconsistency, in the idea of a concurrent jurisdiction in the state courts. But, in examining the whole instrument, and considering the objects and design of the federal government, and its genius and structure, in relation to the state governments, and allowing, also, to the federal government the inherent and implied power of self-preservation, I think the constitution has vested in Congress a large discretion; not only in the organization of the courts of the Union, but in the modification of the judicial power of the *United States*, in the specified cases to which it is to extend.

This legislative discretion I find in that clause of the constitution which empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the *United States*, or in any department or officer thereof."

It is here worthy of remark, that the constitution has so completely framed and reared the *legislative* and *executive* departments, that nothing remained but to elect and appoint the representatives, senators, president, and vice president; and those functionaries were ready to move in *their appointed spheres. But the primary duty of *creating* the judiciary department, is referred to Congress. The constitution, in regard to that branch of the government, has done no more than to enjoin upon Congress the duty of organizing the Courts of the Union; and of distributing and regulating the judicial power in the specified cases.

The legislative discretion on that subject has, indeed, important constitutional limits. There *must* be a Supreme Court; there may, and I think there *must* be, at all times, courts of the *United States* *inferior* to the Supreme Court. The judicial organs of the Union *shall have* jurisdiction in all the specified cases. Congress, therefore, cannot divest them of such jurisdiction. In certain of those specified cases, "the Supreme Court *shall have original jurisdiction*;" and in all the other specified cases, it "*shall have appellate jurisdiction*, with such exceptions, and under such regulations, as Congress shall make."

These are all the provisions in the constitution, in regard to the judicial power; and we find, that in the "act to establish the judicial courts of the *United States*," (24th September, 1789;) Congress not only organized the courts, and gave a legislative exposition of the constitution in many particulars, but also exercised a broad discretion in enacting, that in certain cases the jurisdiction of the various courts shall be origi-

nal or appellate, exclusive or concurrent, as they deemed expedient, in reference to the state courts.

The question now is, whether Congress have transcended the limits of the constitution in enacting, that for the pecuniary penalty in this case, a "*suit and recovery may be had in any state court,*" &c. "*having like jurisdiction?*" I admit that Congress cannot vest judicial power in a state court, nor transfer such power from the federal courts, so as to divest them of it; but there is a class of cases, in which I think Congress has a discretion to make the jurisdiction of the federal courts either *exclusive or concurrent*, as they shall judge expedient, from time to time. In all the specified cases, the judicial power of the Union, either original or appellate, must exist, and be maintained in the federal courts, except where Congress may see fit to limit *the right of appeal. But the constitution is as completely satisfied, and the design of the federal judicatures is as well answered, in many of the specified cases, by the exercise of *appellate*, as of *original*, jurisdiction. Nor does it make any essential difference, whether the jurisdiction of the federal courts be exclusive of, or concurrent with, that of the state courts; because the *appellate* power of the federal courts is made co-extensive with the *concurrent* jurisdiction of the state courts in the specified cases, unless Congress choose to limit the right of appeal. For instance, "in all cases in law and equity arising under the constitution, the laws of the *United States*, and treaties made, or which shall be made, under their authority," it is not very important, as it regards public policy, whether the state courts have *concurrent* jurisdiction or not, because the *appellate* power of the federal courts *attaches* in all those cases, and it is ordinarily an ample remedy for correcting state influence or partialities, and producing uniformity of decision.

In the particular case now before us, I cannot bring my mind to the conclusion, that Congress has violated the constitution in enacting that this "suit may be brought, and a recovery had," in a state court. That statute has, in effect, only waived the exclusiveness of federal jurisdiction, *quoad hoc*; and our entertaining this suit is perfectly consistent with the *concurrent*, as well as the *appellate*, jurisdiction of the federal courts. Whether we hold cognizance or not, the judicial power of the *United States*, in this case, is "*vested in*" the federal courts; it does "*extend to*" the case now before us; and if we decide wrong, it is a case for an appeal from the court of *dernier resort* of this state, to the Supreme Court of the *United States*.

The decision of the Supreme Court of the *United States* in the case of *Martin v. Hunter's Lessee*, (1 *Wheaton*, 304.) has my entire approbation; and I gladly avail myself of this occasion, to render my tribute of respect for the profound, perspicuous, and dispassionate reasoning of the two learned judges

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who delivered opinions in that case. I am unable to discern how that decision can be applied as an authority in favor of the defendant in this case. The principal *question there was, whether the appellate jurisdiction of the Supreme Court of the *United States* extended to a judgment of the highest court in *Virginia*, which involved the construction of a treaty; and whether the act of Congress, allowing and regulating such appeal, was constitutional? The court decided in favor of such appellate jurisdiction, and affirmed the validity of the statute of the *United States*, on the ground, that as the cause involved the construction of a treaty, it was one of the specified cases in which the judicial power of the *United States* "*shall be vested*" in the federal court, and to which the judicial power "*shall extend*;" and that, although the state court had rightful original jurisdiction of the cause, yet, if in any stage of it the construction of a treaty became material, then the *casus fœderis* occurred, and the appellate jurisdiction was "*vested in*" the federal court, and "*extended to*" the case. Far from wishing to impeach that decision, I claim to derive authority from it in support of my opinion in this cause.

That case shows, that I am correct in assuming the position, that in this case, one of those specified the Federal Court is "*vested*" with jurisdiction, although the state court also has original and concurrent jurisdiction over the same subject; or in other words, that to *be vested with*, does not imply *exclusive* jurisdiction.

The questions in this case, according to my apprehension, are these: 1st. Whether, independent of any provision in the constitution of the *United States*, the general common law jurisdiction of this court, attaches in such a case? and 2dly, If such a right exists on general principles, as an inherent power in this court, whether there be any thing in the constitution of the *United States* which deprives us of such jurisdiction? These questions depend upon the positive enactments of the constitution, and our peculiar municipal regulations; and, therefore, we cannot expect to derive much light from any adjudged cases in *England*, or from any foreign jurists. But, with patriotic pride, I refer to the opinions of a profound jurist, and illustrious statesman of our own country, whose mind illumined every object to which it was directed. The intellect of *Hamilton* has beamed upon this subject; and his cotemporary exposition *of the constitution, deserves the most respectful deference.

In the number 82 of *Publius*, (see *Federalist*, 2d vol. page 243.) he says, "the states will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is

prohibited to the states; or where an authority is granted to the Union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary, as to the legislative, power; yet I am inclined to think, that they are, in the main, just, with respect to the former as well as the latter. Under this impression, I shall lay it down as a rule, that the state courts will retain the jurisdiction they now have, unless it appears to be taken away by one of the enumerated modes." "The only thing in the proposed constitution, which wears the appearance of confining the causes of federal cognizance, to the federal courts, is contained in this passage, 'the judicial power of the *United States*, shall be vested in one Supreme Court, and in such inferior courts as the Congress shall, from time to time, ordain and establish.' This might either be construed to signify, that the supreme and subordinate courts of the Union, should alone have the power of deciding those causes to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint: in other words, that the *United States* should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals; and as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction."

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"But this doctrine of concurrent jurisdiction, is only clearly applicable to those descriptions of causes, of which *the state courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the constitution to be established; for not to allow the state courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority. I mean not, therefore, to contend, that the *United States*, in the course of legislation upon the objects entrusted to their discretion, may not commit the decision of causes arising upon a particular regulation, to the federal courts solely, if such a measure should be deemed expedient; but I hold, that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and, *I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth.* This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws; and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative

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to the laws of the most distant part of the globe. Those of *Japan*, not less than of *New-York*, may furnish the objects of legal discussion to our courts. When, in addition to this, we consider the state governments, and the national government, as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

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"Here another question occurs; what relation would subsist between the national and state courts, in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the *United States*. The constitution, in direct terms, gives an appellate jurisdiction to the Supreme Court, in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The *objects of appeal, not the tribunals from which it is to be made, are alone contemplated."

"Agreeably to the remark already made, the national and state systems are to be regarded as *one whole*. The courts of the latter will, of course, be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice, and the rule of national decision. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union."

If I do not deceive myself, the whole scope of this commentary corresponds with the view which I have taken of this subject, and fully authorizes the inference, that if the act of Congress, imposing these pecuniary penalties, had not appointed the *forum*, the original jurisdiction would have been concurrent. Congress have said, that the federal courts shall have exclusive jurisdiction in regard to these penalties, except where the cause of action arises more than fifty miles from the place of holding the District Court; and in this peculiar class of cases they allow a concurrent jurisdiction.

The "act to establish the judicial courts of the *United States*," (*September 24, 1789*), and all the successive acts of Congress on that subject, accord with this interpretation of the constitution; for it will be seen, that Congress have exercised a discretion, which has been varied from time to time, so as, at one time, to give *exclusive*, and at other times only *concurrent*, original jurisdiction to the federal courts over the same subject.

The decision in the case of *Martin v. Hunter's Lessee* (before cited,) has settled the point, that wherever a state court holds cognizance in any of the specified cases to which "the judicial

powers of the *United States* extends," the Supreme Court of the *United States* has *appellate* jurisdiction, subject only to such exceptions as Congress shall make, so that the system is rendered harmonious, and the design of the constitution is effectuated, by securing to the courts of the Union, either original or final jurisdiction, in *all the cases in which our national policy required that the federal government should exercise supreme judicial authority.

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I have read and examined, with respectful attention, the opinion of the General Court of *Virginia*, in the case of *Jackson v. Row*, (delivered by *White*, presiding judge, and published in the *National Intelligencer*, on the 23d of *December*, 1815,) on the very point now before us; and, with great respect for that high tribunal, I think it *erred* in pronouncing, that "the act of Congress was unconstitutional;" and "that to assume jurisdiction over the case, would be to exercise a portion of the judicial power of the *United States*." I am of opinion, that this court has jurisdiction to give a *civil remedy* for a debt due to the *United States*, whether that debt accrued upon contract, or by way of penalty for a violation of a statute. We do not acquire such jurisdiction by virtue of the act of Congress; it is inherent in this court, as a court of general common law jurisdiction. Congress cannot *compel* a state court to entertain such a suit. If they had said, *imperatively*, that state courts shall hold cognizance in such cases, then, indeed, the question would have arisen, whether they had a right to constitute us the organ of judicial power for the *United States*? In the present case, I do not understand them as intending such an absurdity. In enacting that "such suit and recovery may be had before any state court, &c., having jurisdiction in like cases," I understand nothing more than that the *United States* voluntarily submit themselves as suitors in our courts, and the attorney for the *United States* is authorized for that purpose. In doing so, Congress have not attempted to ordain and establish the state courts, as inferior courts of the *United States*, in the sense of the constitution; but have, in effect, merely qualified, or repealed in part, the original statute of the *United States*, (passed the 24th of *September*, 1789,) which gave *exclusive* jurisdiction to the federal courts for such penalties. If a state has no organs of judicial power adapted to such a case; or if a state court refuse to hold cognizance in such a suit, then the provision in the act of Congress becomes nugatory, and the remedy must be had in the federal court. If a state court exercises *jurisdiction in such case, it is subject to the *appellate* jurisdiction of the federal court.

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Whether the courts of one sovereign would hold jurisdiction of civil suits, wherein another sovereign appears as plaintiff, depended originally on the pleasure of the sovereign to whom the suitor applied for justice; but by the usage and comity of

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nations, it has ripened into a right, in all cases of contract, so as to impose a duty on the courts of every sovereign to afford such remedies to any other sovereign, or his subjects, *at peace* with the nation where the remedy is sought. It seems to me that the General Court of *Virginia* erred in assuming, which they appear to do in the case of *Jackson v. Row*, (before cited,) that their right to entertain such a suit was to be derived, if at all, from the act of Congress merely, as constituting them a court for that purpose.

Suppose Congress should enact, that custom-house bonds shall be sued in the state courts; such a law would not establish new courts for the *United States*; it would not enlarge the jurisdiction of state courts; but must be considered as *directory* to their attorney to ask a remedy in our courts. Suppose our national government should direct the attorney for the *United States* to sue for like penalties in the courts of *Florida*, or of *Canada*, it might be justly said, that such an act would be inexpedient and unwise, as improperly asking a favor of a foreign government, which it might lawfully grant or refuse; but I see no ground to say, that such an act would be *unconstitutional*.

In regard to the distinction between civil actions founded on penal statutes, and actions on contracts, the law and usage of nations *impose no obligation* on one sovereign to afford a remedy to enforce a *penal law* of another sovereign; and it is optional for the former to do it or not, according to his own convenience.

It is said to be a fundamental maxim, that the courts of one sovereign will not take cognizance of, or enforce, the penal laws of another sovereign; but I think it more correct to say, that *one sovereign ought not to entrust the execution of his penal laws to the courts of another sovereign*; and as applicable to sovereigns of distinct and separate territorial *jurisdictions, there is obvious reason and wisdom in the policy of such usage. But when we consider the complex and peculiar structure and relations of our federal government and our state governments, moving, indeed, in different spheres, but occupying the same territorial space, and operating upon, and for the benefit of the same people, the practice of other independent nations affords no analogy sufficiently strong to guide us in the present case.

That a state court can in no case hold jurisdiction to punish, *criminaliter*, for an offence against the *United States*, is clear, for this plain reason, that every criminal prosecution *must* charge the offence to have been committed against the state or sovereign, whose courts sit in judgment on the offender. In the administration of criminal justice, every sovereign acts as judge in his own case, as the offended party; and a state court cannot act as an organ of judicial power representing

the *United States*, because, in its appointment, tenure, and accountability, it is independent of the federal government.

This court, in its judicial functions, now represents the sovereignty of the state of *New-York*, as to the question before us; and, considering the intimate relation between the state, and the *United States*, and the common interest which all the states have, in maintaining and giving complete effect to the laws of the Union; and considering, also, that the provision in the act of Congress in this class of cases, is for the benefit and accommodation of our own citizens, in rendering it more cheap and easy to defend themselves when sued for such penalties; I think it fit and expedient to afford the remedy of a *civil action*, to enforce *this penal statute* of the *United States*.

In coming to this conclusion, I perceive no *great danger* of introducing those evils, so eloquently described, and so feelingly deprecated by the General Court of *Virginia*, as a "system of a strange kind of *Mosaic* war, in the judiciary of nations. Here a *Cadi* sitting in judgment upon an *Italian*, denying the pope's infallibility; there the stern fathers of the holy inquisition, putting a poor *Turk* to the rack, because he denies that *Mahomet* is the prophet of *God*; the judges of republican *Virginia*, pillorying an *Englishman** for libeling royalty; and the court of King's Bench, inflicting the same punishment upon an *American*, for libeling the government of the *United States*, for the late declaration of war." (*Jackson v. Row*, before cited.)

Whenever either of the cases supposed by the General Court of *Virginia* shall occur, I will examine it without prejudice; but in this case, I am of opinion, that there ought to be judgment for the plaintiffs.†

Judgment for the defendant.

WADDINGTON *against* THE UNITED INSURANCE COMPANY.

THIS was an action on a policy of insurance on the cargo of the Brig *African*, "at, and from *Gothenburgh* to *Carlshune*, or any other port of delivery in the *Baltic*; if turned away,

the usual money counts, he will be entitled to a judgment for a return of the *premium*, if the court should be of opinion, that he cannot recover for a total loss, on the ground, that the policy never attached; provided the defendants have not compelled him to make his election, whether he would proceed for the premium or not.

And as, in such case, the defendant not having paid the *premium* into court, the plaintiff is entitled to interest thereon, from the commencement of the suit, or from the time when the defendants ought to have paid the *premium* into court.

The allowing of interest in cases of this nature, rests in the sound discretion of the court.

The plaintiff is not allowed costs accruing on his claim for a total loss under the policy.

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† *Vide ante*, p. 4

In an action on a policy of insurance, where the plaintiff declares for a total loss, and adds

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or warned not to enter, to a near open port." Premium *seven and a half per cent.*; to return two and a half per cent., if the risk ends at *Carlshune*, in safety. The declaration contained the usual money counts. The *African*, having on board goods of the plaintiff, to the amount insured, sailed from *Philadelphia*, on the 10th of *April*, 1810, and arrived at *Gothenburgh*, in the month of *June* following. After a long detention, by contrary winds, she set sail from *Gothenburgh*, on the 8th of *October*, 1810, having on board the same cargo which was laden on board of her at *Philadelphia*, and, among the rest, the goods of the plaintiff, and she was, afterwards, wrecked in the *Baltic*, and wholly lost, with her cargo.

At the trial, the plaintiff produced two respectable merchants in the city of *New-York*, as witnesses, who were well acquainted with the *Baltic* trade, and one of whom was at *Gothenburgh* in 1810, and 1811, who testified, that it was usual, and customary, for *American* vessels bound from the *United States*, up the *Baltic*, to stop at *Gothenburgh*, for information *respecting the market, and for orders, and that they often discharge their cargoes there, but that they had never known or heard of an instance of an *American* vessel taking in a cargo at *Gothenburgh*, for the *Baltic*; and that when *American* vessels proceed from *Gothenburgh* up the *Baltic* with cargoes, it was, according to their knowledge and belief, with the same cargoes which they brought thither, and without landing them.

The plaintiff, also, gave in evidence, the order on which the insurance was made, and the letter accompanying the same, which it is unnecessary to state.

A verdict, by consent, was taken for the plaintiff, subject to the opinion of the court, on a case made, and which either party was to be at liberty to turn into a special verdict. The plaintiff claimed, at *first*, to recover for a total loss.

T. L. Ogden, for the plaintiff, stated, that he demanded only a return of the premium, with interest.

Hoffman, and *S. Jones, jun.*, contra, said, that they did not deny, that the plaintiff was entitled to a return of premium; but they insisted, that it could not be recovered in this action; and that, at any rate, interest ought not to be allowed. Interest is not recovered, of course, in these cases.

Ogden, in reply. The courts have uniformly given to the plaintiff a return of the premium, on the money counts in the declaration, when they considered him not entitled to recover for a total loss, on the ground that the policy never attached. It would be unreasonable to require the plaintiff to bring two actions, one for a total loss, and the other for a return of premium.

Per Curiam. The plaintiff abandons all claim, except for the return of the premium, and on this he claims interest. The defendants admit their liability for the premium, but insist that it ought not to be recovered in this action, and contend, also, that interest ought not to be allowed.

The cause has hitherto been contested on different principles; *the plaintiff claiming to be paid a total loss on the goods. His action, however, is adapted to recover the premium; and as the defendants have not taken measures to compel him to elect whether he would go for the premium or not, the court cannot deny him a right to recover according to his case. The defendants are in default. They ought to have paid the premium into court, and then, if the plaintiff had persisted, it would have been at his own hazard. The question of interest in actions of this nature, is within the sound discretion of the court, and it will be allowed or not, according to circumstances. It is certainly true, that the defendants have had the use of the plaintiff's money, and we think they ought to repay it with interest, from the time when they ought to have taken their stand, and paid the premium into court. They never could have imagined that they could successfully contest the loss, because the goods were not laden on board at *Gottenburgh*, and keep the premium also. We are of opinion, that the plaintiff is entitled to recover the premium and interest thereon, from the time of the commencement of the suit. In taxing the costs, the plaintiff will not have a right to any costs, accruing on his claim for a loss under the policy.

Rule accordingly.

The President, Directors, & Co. of the MERCHANT'S BANK, *against* BIRCH and DE WITT, Executors of BIRCH.

THIS was an action of *assumpsit*, brought by the plaintiffs, as endorsees of a promissory note, against the defendants, *as executors of the endorser; and was tried the 4th of *December*, 1818, at the *New-York* sittings, before the late Chief Justice.

The note was dated the 22d of *September*, 1815, made by *Whiting & Watson* for 1,300 dollars, payable to *J. E. R.*

notice of the non-payment must be given to them, for they represent the testator or intestate. But where a note fell due the 22d of *December*, and the endorser, being absent on a voyage for the recovery of his health, died at sea, on the 12th of *December*, but his death was not known to the holders until *March* following, and the will was not proved, nor letters testamentary granted until *April* following, it was held, that notice of the non-payment having been left, at the time, at the dwelling-house of the endorser, his last place of residence, in *New-York*, and also sent by post to his family, who had shortly before removed into the country, it was sufficient to support an action against the executors of the endorser, without showing any notice to them of the non-payment.

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If an endorser of a note be dead at the time it becomes payable, and there be executors or administrators known to the holder,

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Birch, or order, eighty-eight days after date. Payment was duly demanded of the makers on the 22d of *December*, and notice of the non-payment, directed *J. E. R. Birch*, was, on the next day, delivered at the late dwelling house of the endorser in the city of *New-York*, his family having a short time before removed to *Newburgh*. At the time the notice was so delivered, there was affixed on the door of the house, a notice, directing all persons having any business with *J. E. R. Birch*, to call on *Dr. Smith*, No. 338 *Pearl street*. Another notice of the non-payment, directed in the same manner, was, on the same day, delivered to a student at the house of *Dr. Smith*; and a similar notice of non-payment, directed to *J. E. R. Birch*, at *Newburgh*, was, on the same day, put into the post-office in the city of *New-York*. The notary who protested the note, in a conversation with *De Witt*, one of the defendants, and the brother-in-law of the endorser, inquired of him to whom he should deliver notice of the non-payment of the note, and *De Witt* replied, "To Doctor *Smith*; he has the care of all *Dr. Birch's* notes;" and *De Witt*, at the same time, informed the notary, that the family of the endorser had removed to *Newburgh*.

It was admitted that *Birch*, the endorser, sailed from *New-York* on the 17th day of *November*, 1815, on a voyage to *Teneriffe*, for the recovery of his health; and that he died at sea, on the 12th of *December*, 1815. The will of the deceased was proved, and letters testamentary granted to the defendants, on the 22d of *April*, 1816; but no notice of non-payment of the note was ever delivered to the defendants, after the letters testamentary were so granted to them. The family of *B.* removed to *Newburgh* a short time after he sailed from *New-York*, and continued to reside there until *May*, 1817. The death of *B.* was not known in *New-York* when the notices of non-payment were given, and not until his wife returned from *Teneriffe*, about the last of *March*, 1816.

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*Upon the evidence of these facts, the defendants requested the judge to charge the jury, that, as the note fell due after the death of the endorser, the holders ought to have given notice of the non-payment to the defendants, as executors, within a reasonable time after the probate of the will of the testator, and, not having done so, the defendants were not liable; but the chief justice being of opinion that the plaintiffs had given sufficient notice of the non-payment, the jury, under his direction, found a verdict for the plaintiffs, for 1590 dollars and 29 cents.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court, on the above case without argument.

SPENCER, Ch. J., delivered the opinion of the court. The only question in this case is, whether due notice was given of

the non-payment of the note by the maker, so as to charge the defendants, who are the executors of the endorser.

It is not denied, that the plaintiffs, the holders of the note, gave all the notice in their power to give, when the note fell due; notice was left at the last residence of the endorser, another notice was left with his reported agent, and another was sent to the residence of his family in the country, through the post-office. But it is insisted, that the endorser being, in fact, dead when the note fell due, although the fact was unknown until some months afterwards, notice should have been given to his executors. It appears, that the note became due on the 22d of *December*, 1815, that *Birch* sailed from *New-York* on the 17th of *November*, 1815, on a voyage to *Teneriffe*, and died at sea, on the 12th of *December* following; that his will was proved, and letters testamentary granted thereon, on the 22d of *April*, 1816, and that his death was not known at *New-York* until the last of *March*, 1816. No notice was given to the executors of the non-payment of the note.

The case of *Stewarts v. The Executors of Elen*, (2 *Caines's Rep.* 121.) governs and decides this case. In that case, the note fell due on the 8th of *November*, 1798, the endorser, *Medcef Elen*, died on the 13th of *September*, 1798; and it *was held by the court, that notice directed to the endorser himself, and left at his dwelling house, which was shut up, was good notice. Mr. Justice *Livingston*, in delivering the opinion of the court, observed, "nor was it fatal to direct the notice to the endorser himself, for as it was not known, whether he had made a will, nor who his executors were, until long after, it was full as probable, that it would reach the parties interested by this address, as by any other; some one of the deceased's family would open it, or see it safely delivered to an executor; the notice, therefore, was well served, and its address proper."

If an endorser be dead, at the maturity of a note, and there be executors, or administrators, at that time, known to the holder, notice must be given to them, for they represent the testator, or intestate, and are as fully entitled to notice as he would be, if alive. But it is a novel principle, unsupported either by precedent or authority, that notice is to be given to the representatives of the endorser, and who become such long after the note has fallen due. The rights of the holder of a note or bill, are to be determined by his acts, when the note or bill becomes due; and if he then gives such notice, as under the existing state of facts the law requires of him, his rights are fixed, and he cannot be required to superadd any other notice, at a future period. In the case cited, no notice had been given to the executors, and we perceive, that the notice delivered at the dwelling house of the deceased endorser, was pronounced to be well delivered.

We have not been furnished with the pleadings, and, there-
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fore, cannot notice any suggestions, that the proof did not correspond with the averments in the declaration ; nothing is referred to us, but the single point, whether due notice was given to the endorser.

Judgment for the plaintiffs.

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*JACKSON, *ex dem.* LIVINGSTON and others, *against*
FREER.

Where a large tract of land was granted, by the commissioners of the land office, to L. and others, describing the tract by its exterior lines alone; and directing the tract to be surveyed by the surveyor-general, and patents to be issued for the several lots, according to the return and map of such survey; and the patents described the lots, with a reference to the map on file in the secretary's office, it was held, that the patents were to be understood as referring to the field book and actual survey, as well as to the map on file; that the owners of the several lots were bound by their actual locations, according to the lines on the ground, without regard to the circumstances, that some of the lots would exceed, and some fall short of the quantity

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of acres mentioned in the patents.

THIS was an action of ejectment, for land in *Walton* in *Delaware* county, and was tried at the *Delaware* circuit, before Mr. Justice *Yates*, on the 30th of *June*, 1818.

The lessors of the plaintiff deduced a regular title, by descent, from *Peter Van Brugh Livingston*, the patentee, to lot No. 104. in the tract of land granted to *Peter Van Brugh Livingston*, *Lawrence Kortright*, and others. The patent was dated the 14th of *August*, 1786, and passed the secretary's office the 22d of *September*, 1789, and was introduced at the trial, with an exemplification of the map made under the direction of the surveyor-general, and filed in the secretary's office, designating the several lots in the tract. From authenticated copies of the minutes of the commissioners of the land office, on the 8th of *October*, 1785, and the 6th of *May*, 1786, it appeared, that the commissioners granted the said tract of land, describing it by its exterior boundaries alone, to *Peter Van Brugh Livingston*, and others, and had directed the same to be surveyed by the surveyor-general, and patents to be issued for the several lots, according to the return, and map of such survey.

The plaintiff proved, by *S. Bartlett*, a surveyor, that, in locating lot No. 104. according to the map filed in the secretary's office, and according to the courses and distances given in the patent, it would include about thirty-four acres of the premises in the possession of the defendant.

The defendant gave in evidence a patent to *S. Wattles*, for lot No. 90. in the above-mentioned tract, dated the 19th of *August*, 1789; and a deed for the same lot, from *Wattles* to him, dated the 1st of *November*, 1803. The defendant also produced copies of the field book of the original survey, duly authenticated.

Bartlett, the surveyor, who was called as a witness, testified, that he had surveyed lot No. 90., and stated the particulars of the survey; that the defendant possessed the lot according to the lines now on the ground; that the witness *had examined the old marked lines, and corners, as originally surveyed, and that the possession of the defendant corresponded with them, but that the old survey, and possession, did not correspond

with the map on file in the secretary's office. That the witness resides on the tract, and is acquainted with it, and that about one half of the lots are settled and improved, and that, as far as he is acquainted with them, they are held according to the lines and boundaries made in the old survey, excepting three lots which have been settled within three years, according to a new survey made by direction of the proprietors of those lots.

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Another witness stated, that lot No. 90. was improved more than 20 years ago, and that the defendant had been in possession about 14 years.

Bartlett, the surveyor, further testified, that, according to the survey on the ground, and the lots there marked out, some of them could not be located within the exterior boundaries of the tract; but some of the lots, and among them lot No. 104., would, in part, fall within *Leake's* patent, which is older than the one to *Livingston*. But on surveying the lots according to the maps filed in the secretary's office, and the patents issued in reference thereto, there was land enough to give each lot its full complement of acres; and that lot No. 90., as now located and possessed, contained 277 acres. That he had surveyed the exterior boundaries of the said tract sufficiently to ascertain that there was width enough to give to each lot its full complement. That he had found no stakes or stones at any of the corners of lot No. 90.

The jury, under the direction of the judge, found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial.

Sudam, for the plaintiff. He cited *Jackson, ex dem. Crossett, v. Hunter*, (1 Johns. Rep. 495.)

T. A. Emmet, contra. He cited *Jackson, ex dem. Goodrich, v. Ogden*, (4 Johns. Rep. 140. and S. C. 7 Johns. Rep. 238. and *Jackson, ex dem. Kortright, v. Reid*, relative *to the same land, decided in May term, 1811. (not reported.)

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SPENCER, Ch. J., delivered the opinion of the court. The plaintiff's counsel seem to suppose that the lessors of the plaintiff had a priority of title, and were, therefore, entitled, at all events, to have the complement of acres mentioned in the patent for lot No. 104. This is manifestly a mistake. The owners of the tract would have been tenants in common, but for the partition which took place between them. The patents were issued on the mutual agreement of those interested in the whole tract, to sever their common rights; and thus the agreement was carried into complete effect. As between the tenants in common, it was immaterial when the patents were dated, they became entitled to the lots in severalty, in virtue of their agreement, and it was perfected by issuing the letters patent.

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JACKSON
v.
FREER.

The real question is, Which shall prevail, the actual location of the lots on the ground, by marking and numbering trees at the corners, and 'by marking the lines of the lots; or the courses and distances which the map represents the lots as entitled to?

The survey of the lots, and the actual location of them, was the joint act of all the parties interested, and must control. The map was intended to represent the relative situations and localities of the lots, as regarded each other: the actual survey was the practical location; and although the patents do not specially refer to the field book and the actual survey of the lots, they virtually referred to them, by referring to the map. It was composed from the survey, and the lots acquired their individuality from the survey also. Without, therefore, any express reference to the field book or survey, the reference to the map was a reference to its accompaniments, the field book and survey. In *Jackson v. Ogden*, (7 Johns. Rep. 241.) Chief Justice *Kent*, in delivering the opinion of the court upon a question involving one of the lots in this tract, said, "that when the question was rendered ambiguous or uncertain, by the contradiction between the map and survey, a practical location and construction given by the parties, and acquiesced in *through a series of transfers, and for a great number of years, until the lands had become cultivated and grown into value, cannot but operate with great, if not decisive, force." Those observations apply, with peculiar weight, in the present case; for all the lots, with the exception of three, which have been quite recently entered upon, have been held and possessed ever since the settlement of the country, according to the original and actual survey of the lots.

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To locate lot No. 104. according to the map, and rejecting all that has been done by the patentees themselves to give fixed and definite boundaries to the lots, would throw every lot in the whole tract into a state of confusion. We are bound, as well by a regard to the quiet of the country, as to the acts of the parties, to hold them concluded by their actual location of the lots, without being influenced by the consideration, that some lots fall short, and others exceed the number of acres mentioned in the patents. This was matter of accident, and the patentees took their chances for the lots on the ballot.

We have been referred to a decision of this court in *May* term, 1811, in the case of *Jackson, ex dem. Kortright* and others, v. *Reid*, conforming to the principles now adopted; and although that case is not reported, it undoubtedly was decided in consonance with this case. (a)

Motion for a new trial denied, with costs.

(a) See *Jackson, ex dem. Johnson and others, v. Talmadge*, 4 Cowen, 150. *Jackson, ex dem. Smith, v. Marsh*, 6 Cowen, 281. *Ex parte Jennings, ibid.* 518 536. 579.

***The President, Directors, and Company, of the NEW-BURGH AND COCHECTON TURNPIKE COMPANY against BELKNAP.**

ALBANY,
August, 1819.

NEWBURGH
& COCHECTON
TURNPIKE
COMPANY

v.
BELKNAP.

IN ERROR to the Court of Common Pleas, of the county of *Orange*. The plaintiffs brought an action of assumpsit in the court below, against the defendant, to recover *toll* claimed to be due to them from the defendant, for travelling, with his cattle and carriages, on the turnpike road, and through the gate in *Newburgh*, belonging to the plaintiffs. It was proved, that the defendant, and his servants, had passed through the toll gate divers times, in the years 1813, 1814, and 1815; and that the defendant being asked by the toll-gatherer, in 1813, to whom the toll was to be charged, answered, that it was to be charged to him, the defendant, which was accordingly done; and the toll so charged, according to the rates established by the act incorporating the plaintiffs, amounted to 149 dollars and 87 cents.

It was proved, by the defendant, that he owned a farm on the east side of the toll-gate, and within one mile thereof, on which he resided; and that he was part, and principal owner, and superintendent of another farm, on the west side of the gate, about one mile therefrom; that, during the periods above mentioned, he was erecting several buildings on the farm west of the gate, and which contained about 1,000 acres; that during the time the toll was claimed, the defendant was employed in carrying lime, boards, timber, and other materials, from the lime-kiln, and saw-mill, on the farm east of the gate, to be used in the improvements on the other farm; and in carrying materials from the farm west of the gate to the farm east of the gate; and that the toll charged on such occasions, amounted to about two thirds of the toll claimed. This evidence was objected to, but the court below decided that it was proper, and ought to bar the plaintiffs from a recovery of part of the amount demanded.

The plaintiffs tendered a bill of exceptions to the opinion of the court; and having submitted to a nonsuit, the court below gave judgment against them for the costs.

The case, on the record, and bill of exceptions, was submitted to the court without argument.

According to the true construction of the 10th section of the act incorporating the *Newburgh, &c. Turnpike Company*, (sess. 24. ch. 36. 2 K. & R. 459.) a person who owns a farm on the west side of the toll-gate, and another farm on the east side of the gate, within a mile thereof, is exempted from toll, on passing through the gate with materials from one farm to the other, for building and improvements, it being, according to the proviso, the common business of his farm.

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Per Curiam. The whole question depends on the construction to be given to the proviso to the 10th section of the act incorporating the plaintiffs. (2 K. & R. 459. sess. 24. ch. 36.) That section fixes the rates of toll demandable, from all persons using the road, at the gates; and the proviso declares, that nothing in the act shall be construed to entitle the corporation to demand toll of or from any person passing to or

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August, 1819.

KINNIE
v.
WHITFORD.

from public worship, on *Sunday*, or to or from his common business on his farm, &c.

We think that the court below did not err in their construction of the act. The defendant had two farms, the one on the east, and the other on the west side of the toll-gate; and the teams passing with materials from the one farm to the other were passing on the common business of his farm. If this case is not within the proviso, we are at a loss to know what business will exempt a person passing the gate from toll. It is the plain, common sense, of the act, and according to its natural and just construction. We are of opinion, therefore, that the judgment below ought to be affirmed.

Judgment affirmed.

KINNIE, *qui tam*, &c. against WHITFORD.

In a *qui tam* action, bail to a writ of error is not required by the statute, (1 N. R. L. 143. [* 35] 2 R. S. 595, 596. § 26, &c.) in order to make the writ a *supersedeas*.

Where an execution is issued and actually levied, before the writ of error is filed, it is no *supersedeas*.

MOTION on the part of the defendant that the writ of error, filed in this cause, be a *supersedeas*, to the execution issued on the judgment, &c. It was an action of debt, brought by the plaintiff, *qui tam*, &c. under the eighth section of "the act to prevent and punish champerty and *maintenance." A judgment was obtained by the plaintiff for 400 dollars, and the record was filed on the 31st of May last. A writ of error *coram vobis* was brought to reverse the judgment, and counsel certified that there was error in the record. It further appeared, from the affidavit of the plaintiff's attorney, that an execution had been issued on the judgment, returnable at this term, and was actually levied on the property of the defendant, on the 11th of July last, before the writ of error was allowed and filed.

Per Curiam. In a *qui tam* action, the statute (1 N. R. L. 143. sess. 24. ch. 25. s. 2. 2 R. S. 595, 596. sec. 26, &c.) does not require that bail to a writ of error should be put in, in order to make it a *supersedeas*. But in this case the execution had issued, and was actually levied on the property of the defendant, before the writ of error was filed; and the writ of error was, therefore, no *supersedeas*. This was so decided in *Blanchard v. Myers*, (9 Johns. Rep. 66.) (a)

Motion denied.

(a) See *Blunt v. Greenwood*, 1 Cowen, 21. When a writ of error is taken on a judgment in partition, bail is necessary in order that it may operate as a stay of execution; so in ejectment and dower, 6 Cowen, 611.

ALBANY,
August, 1819.JOURDEN *against* HAWKINS.

JOURDEN

v.

HAWKINS.

MOTION for an attachment against *James Campbell*, late sheriff of the county of *Herkimer*, for not bringing in the body of the defendant, who was arrested on a *capias ad resp.*, returnable in *January* term, 1818, and which had been returned with an endorsement thereon by the sheriff "*cepi corpus*." It appeared that the *capias* has been delivered to the deputy sheriff, who, on the 20th of *March*, 1818, put in special bail for the defendant, to wit, himself and *John Doe*; and the affidavit of the deputy stated, that on the 2d of *April* he put a written notice of the special bail being filed *in to the post-office, directed to the plaintiff's attorney. On the 16th of *June*, 1819, the plaintiff's attorney entered a rule for the sheriff to bring in the body of the defendant, &c.; and on an affidavit of the service of that rule, and that no notice of bail had been received, he now moved for the attachment against the late sheriff. It appeared, from the affidavits read, that the defendant was insolvent when he was arrested on the *capias*, and continued to be so, and that he had since absconded. The deputy sheriff and his sureties had also become insolvent.

Where a sheriff had returned *cepi corpus* to a *capias ad resp.*, and the deputy sheriff who served the writ became special bail, of which notice was sent by mail, but not received by the plaintiff's attorney,

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ney, who, eighteen months afterwards, ruled the sheriff to bring in the body, and on affidavit of service, &c. moved for an attachment, the deputy and his sureties having, in the mean time, become insolvent, the court refused to grant an attachment, considering it unjust and unreasonable that the sheriff should be liable to an attachment, after the plaintiff had lain by for so long a time

Per Curiam. In the case of the *King v. Surry*, (7 Term. Rep. 452.) where the plaintiff, after the return of *cepi corpus* to a writ, delayed ten months before he ruled the sheriff to bring in the body of the defendant, and both the defendant and his bail had, in the mean time, become insolvent, the court of K. B. set aside an attachment which had been issued against the sheriff. The Court of C. B., in the case of *Rex v. Perring*, (3 Bos. & Pull. 151.) held the sheriff discharged under similar circumstances. Here the plaintiff has lain by eighteen months, after the return of the writ, before ruling the sheriff, and after the bail and the deputy's sureties have become insolvent. We adopt the rule of the *English* courts, in this respect, as just and reasonable, and, therefore, refuse the attachment.

Motion denied. (a)

(a) Vide *People v. Stevens*, 9 Johns. Rep. 72. See also *Seymour v. Curtis*, 1 Wendell, 105. 2 Ibid. 253. *The People v. Shoemaker*, and 2 Cowen, 477. n. (a).

ALBANY,
August, 1819.

BENNET

v.

RATHBUN.

*BENNET *against* RATHBUN.

Where an action of trespass, *quare clausum fregit*, is commenced before a justice of the peace, and the defendant puts in a plea of title in the *locus in quo*, and the plaintiff then commences his action for the same trespass in the Court of C. P. of the county in which the trespass was committed, which the defendant, by writ of *habeas corpus*, removes into this court, and the plaintiff, on the trial, recovers damages, he is entitled to double costs, under the 7th section of the act of the 5th of April, 1813, (sess. 36. ch. 53. 1 N. R. L. 390.) it being considered, after the removal to this court, as the same action originally commenced in the court below.

THIS was an action of trespass, *quare clausum fregit*, originally commenced before a justice of the peace, in which the defendant pleaded title to the *locus in quo*. The plaintiff then commenced his action in the Court of C. P. of Otsego county for the same trespass; and the defendant removed the cause by *habeas corpus*, to this court, and it was tried at the Otsego circuit, where a verdict was found for the plaintiff, for five dollars damages.

Brown, for the plaintiff, moved for double costs, under the act, sess. 36. ch. 53. s. 7. (1 N. R. L. 390.) (a)

Campbell, contra.

Per Curiam. The 7th section of the act for the recovery of debts to the value of 25 dollars provides, that where an action of trespass on land is brought before a justice of the peace, and the defendant puts in a plea of title, it shall be reduced to writing, &c., and the plaintiff may then bring his action in the Court of C. P. of the county; "and if such plaintiff shall recover any damages in such action, the defendant shall be liable to pay to such plaintiff double costs." Although the cause be removed into this court by *habeas corpus*, it is still the same action, and the plea of title put in before the justice will, on the trial of the cause, be conclusive evidence that the defendant relied on his title. A different construction would lead to great injustice; for, unless we consider it as a continuance of the same action from the court below, the plaintiff could not recover even single costs, unless the title actually came in question. We are of opinion, that the plaintiff is entitled to double costs.

Motion granted.

(a) See Revised Statutes, vol. 2, p. 225, 226.

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August, 1819

MONTGOMERIE

RIE

V.

IVERS.

*MONTGOMERIE against IVERS.

THIS was an action of *assumpsit*, tried at the *New-York* sittings, in *April*, 1819, before Mr. Justice *Yates*.

At the trial, the plaintiff produced, and read in evidence, a memorandum in writing, signed by the defendant, as follows:

"Bill for	£420	10	8
Damages 10 per cent.	42	1	0
Half per cent. protest, &c.	2	10	0
Interest, 1 per cent. per month	50	9	3
	<hr/>		
	£515	11	11

I promise to pay unto *Robert Montgomerie*, or order, 515*l.* 11*s.* 11*d.* sterling, being protested bill, interest from 31st of *January* last till paid, say 515*l.* 11*s.* 11*d.* sterling, being for value in my bill protested on Messrs. *Robert Burke & Co.* of *Cork*, liable to a special court, *St. Croix*, 16th of *May*, 1810. (The above is to be paid out of my one half proceeds of provisions and lumber, addressed to Messrs. *Hancock & M'Cormick, Bass End*, after deducting your account.)

OWEN EIVERS."

Upon the back of which memorandum, was an endorsement signed by the plaintiff, in the following words:

"*St. Croix*, 1st of *July*, 1811, 200*l.* sterling being the whole amount of the balance in my hands, is hereby acknowledged as part payment of the within obligation.

ROBERT MONTGOMERIE."

*The declaration contained four counts; the first upon the memorandum as a *promissory note*; the second upon the memorandum as a *special agreement*; the third being the usual money counts, and the fourth an *insimul computassent*. The second count contained an averment in these words: "And the said *Robert Montgomerie* avers, that the said *Owen Ivers's* one half of the proceeds of the said provisions and lumber, specified in the said memorandum or agreement, after deducting the said account therein also referred to, afterwards, amounted to the sum of 200*l.* sterling, to wit, on the first day of *July*, in the year of our Lord one thousand eight hundred and eleven, at the city of *New-York*, and in the county of *New-York*, aforesaid, whereof the said *Owen Ivers*, afterwards, to wit, on the same day and year last aforesaid, there had notice."

debt, or that he had applied to the holders of the fund, and had not obtained satisfaction out of it

Where the defendant gave to the plaintiff a written memorandum, at the bottom of which he promised to pay to the plaintiff, or order, the sum specified, being for value in a protested bill, &c., adding, "The above sum is to be paid out of my one half of proceeds of provisions and lumber, addressed to Messrs. *Hancock & M'Cormick, Bass End*, (*St. Croix*), after deducting your account."

Held, that whether the writing was a *promissory note* or not, it was good evidence to support a count on an *insimul computassent*; that the clause providing for the payment out of the proceeds of provisions, &c. was a qualified

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assignment of those proceeds, and an authority to *H. & M.* to apply them to the discharge of the plaintiff's debt: but that the plaintiff was not entitled to recover against the defendant personally, without showing either that there was no such fund as the one designated, or that it was insufficient to pay the

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MONTGOMERY
v.
IVERS.

George Hoope, a witness for the plaintiff, testified, that he had been a merchant established in *St. Croix*, and that the regular legal rate of interest there established is six per cent. a year, except upon protested bills of exchange, upon which it is twelve per cent. a year.

The defendant, thereupon, moved for a nonsuit; 1. Because, there was a variance between the name signed to the memorandum and that mentioned in the declaration, the one being "*Eivers*," and the other "*Ivers*."

2. Because, the said memorandum being by the tenor thereof made liable to a special court in *St. Croix*, (where both parties resided, as appeared by the opening of the plaintiff's counsel,) was intended to be confined to the jurisdiction of said special court, and was not, therefore, cognizable in this court.

3. Because, by the tenor of the memorandum, the money therein mentioned, was payable out of a particular fund in the hands of Messrs. *Hancock & M' Cormick*, of *Bass End, St. Croix*; and that the memorandum could not, therefore, be declared on as a negotiable note, within the statute, but was a special agreement; and that it was incumbent on the plaintiff to prove that a demand had been made where the funds mentioned in the memorandum were deposited, or that the funds were insufficient for the payment of said sum. And *the plaintiff having averred, in his declaration, that the said funds were insufficient, was bound to prove that fact.

4. Because the memorandum not being a negotiable note within the statute, could not, without proof of consideration, be given in evidence under the money counts. The judge stated it as his opinion, that the memorandum was payable out of a particular fund, and that it was, therefore, incumbent on the plaintiff to prove a demand, or that the said funds were insufficient.

By consent, a verdict was taken for the plaintiff, subject to the opinion of the court, on a case to be made, for 2,349 dollars and 60 cents damages, and six cents costs, being for the balance due upon the memorandum after deducting the amount of the endorsement, calculating the interest at the rate of six per cent. per annum, which verdict the plaintiff elected to take upon the two last counts of the declaration.

The case was submitted to the court, on the points stated by the counsel, without argument.

Per Curiam. Admitting the writing given in evidence in this case not to be a promissory note, (and we think it is not,) yet it is good evidence in support of the count on an *insimul computassent*: even an award, void as such, is, in some instances, admissible as evidence of an account stated. The amount due to the plaintiff is ascertained and liquidated between the parties, and the defendant promised to pay it. This amount, to be sure, is to be paid out of a particular fund, to which the

plaintiff was bound, in the first instance, to look ; but suppose no such fund existed, the plaintiff is not to lose his debt. Whether or not a fund is mentioned, as limiting the claim of the plaintiff, or as only directing the application of the fund by the person in whose hands it is, is a question of construction, with respect to which every case rests upon its own foundation. The clause in the written agreement in this case, providing for the payment of the balance out of the proceeds of the provisions and lumber, operates as a qualified assignment of such proceeds, and is an authority to the holders, *Hancock & M' Cormick*, to apply them to the discharge of the plaintiff's debt ; but we are of opinion, that the plaintiff, before he can have recourse to *the defendant personally, must show, either that there was no such fund, or that it was insufficient to pay his debt, or that he had applied to the holders of it, and had not obtained satisfaction out of it. He ought, in fact, to show that the fund to which he was, by the terms of the memorandum, primarily to look, had failed, and of this the endorsement on the memorandum made by the plaintiff, is not evidence. Under the circumstances of this case, however, we direct a judgment of nonsuit to be entered against the plaintiff, instead of a judgment for the defendant generally.

ALBANY,
August, 1819.
CANAJOHARIE
V.
JOHNSTOWN

Judgment of nonsuit.

The Overseers of the Poor of CANAJOHARIE *against* The Overseers of the Poor of JOHNSTOWN.

THIS was a case of an appeal to the Court of Sessions, of *Montgomery* county, from an Order of Removal of a pauper, made by two justices of the peace of *Johnstown*. The Court of Sessions quashed the order, on the ground that the pauper was legally settled in the town of *Canajoharie*. It appeared that the pauper was an illegitimate child, about 14 years old. At the time of its birth, the mother was about 16 years of age, and lived with her father in *Johnstown*, where he had a legal settlement. When the child was a year old, the mother's father removed, with his family, including the mother and child, to *Canajoharie*, where he acquired a legal settlement ; and the mother and her child continued to live with him. Some time prior to the order of removal, the mother of the pauper married a man who had no legal settlement either in *Johnstown* or *Canajoharie*. The pauper had acquired no new settlement in *Johnstown*.

By the statute (1 N. R. L. p. 280. sess. 36. ch. 78. see 1 Revised Statutes, 621. 653. 654.) which has altered the common law, every bastard child is to be deemed settled in the place of the last legal settlement of its mother ; and it makes no difference whether that settlement is acquired by the mother by birth, from her father, or derived to her, through him, in consequence of her father, in

his acquiring a new settlement, she being, at the time of such change of the settlement of her father, in his family and under age.

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CANAJOHARIE
V.
JOHNSTOWN.

Conkling, for the plaintiffs. If the pauper, in this case, gained a legal settlement at *Canajoharie*, it must be either under the third section of the act for the relief and settlement *of the poor, (1 *N. R. L.* 280.) or derivatively from its mother. The question is, whether the words of the statute, "the last legal settlement of his or her mother," refer to the time of the birth of the pauper, so as to fix its settlement at that period, or whether it follows the settlement of the mother, in all its subsequent mutations. The words do not, *ex vi termini*, limit the settlement to the time of birth. At common law, the place of settlement of a bastard was the place of its birth; and the mischief intended to be remedied by our statute was, that by accident, or fraud, a bastard might have its place of settlement distinct from that of its mother. The object of the statute was not to make the settlement of bastards follow that of the mother through all its changes.

If a widow, having children, marries a man of another parish, they are sent back, if they are above seven years of age, to the settlement of their father. (*Salk.* 528. 2 *Bott.* 34. *Carth.* 449.) In regard to legitimate children, they cannot derive a settlement from the derivative settlement of the mother. They can derive a settlement only from the original legal settlement of the parent. There is nothing in the consanguinity of the mother and her bastard child that can communicate the settlement of the mother to the child. The time of birth fixes the place of the settlement of the child. (*Doug.* 8, 9. *Salk.* 427.)

H. Fitch, contra. The statute, no doubt, meant to prescribe a different rule from that of the common law, in regard to the settlement of bastard children. At common law, there are two modes of acquiring an original settlement; by *birth*, and by *parentage*. The place of settlement of a bastard is that of its birth, until it gains a settlement for itself. (1 *Bl. Comm.* 363. 459. 1 *Ld. Raym.* 567.) Legitimate children follow the settlement of their parents; and wherever the father is settled that is the place of settlement of his children. (2 *Ld. Raym.* 1332. 1 *Str.* 580. 8 *Mod.* 169. 2 *Salk.* 528. 3 *Term Rep.* 114. 355. 3 *Salk.* 259.) The act intended to designate the mother as the parent, whose settlement was to be communicated to the child; and to place bastards, in this respect, on the same *footing with legitimate children; and this on principles of policy and humanity. If the doctrine on the other side is the true one, the third section of the act was unnecessary; for, by the common law, the place of birth was the place of settlement. The time for fixing the settlement, is when the question is first raised, and the adjudication must be certain and positive. Now, at the time the order was made, the mother had her settlement at *Canajoharie*.

The words "*last* legal settlement," imply that the *first*,

or primary settlement of the mother, was not intended ; and show, most clearly, that the legislature meant, that the infant should follow the settlement of its mother, wherever it might be, in all its changes, so that the child and its natural parent should not be separated. In *Wynkoop v. Overseers of New-York*, (3 *Johns. Rep.* 15.) *Kent*, Ch. J., says, "as the mother had no legal settlement in the state, the child must be adjudged to be settled where it was born."

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V.
JOHNSTOWN.

If there be any fraud or collusion, a bastard will not gain a settlement at the place of its birth. (3 *Burn's Justice, Poor.*) In *Delavergen v. Noxen*, (14 *Johns. Rep.* 333.) the observation, as to the settlement of bastards, is incorrect.

SPENCER, Ch. J. That was a question merely as to an order of maintenance, submitted to the court without argument, and was correctly decided: the case did not require, or call for the observations which were evidently made without reference to the act for the settlement of the poor. The mistake, however, could not mislead.

Per Curiam. The town of *Canajoharie* was the place of the last legal settlement of the pauper's mother. The pauper was an illegitimate child. At common law, a bastard child was settled where it was born ; but our statute (1 *N. R. L.* 280. sess. 36. ch. 78. sec. 3.) has altered the common law, and declares, "that every bastard child shall be deemed and adjudged to be settled in the city or town of the last legal settlement of the mother." It is, however, urged, that the statute contemplates a settlement *acquired* by the mother ; and not one that is *derivative*, or in consequence of the acquisition of a new settlement through the father of *the pauper's mother, as in this case. We are not at liberty to proceed on such an ingenious distinction: the language of the statute is clear and precise ; that the *last* legal settlement of the mother, however acquired, is that of her illegitimate child. The very expression, *last* legal settlement, supposes that the settlement of the mother might be changed.

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Order of the Sessions affirmed.

ALBANY,
August, 1819

Loan Officers
of ALBANY

v.

CAPRON.

The New Loan Officers of the County of ALBANY
against CAPRON.

A discharge under the act for giving relief in cases of insolvency, (passed the 12th of April, 1813, 1 N. R. L. 460. sess. 36. ch. 36. sec. 9.) obtained the 6th of May, 1817, is a good bar to an action of covenant brought by the loan officers of Albany, on a covenant contained in a mortgage, to recover the balance remaining due on the mortgage, executed by the defendant, under the act passed the 14th of March 1792, (2 Greenl. L. New-York, 100.) after a sale of the mortgaged premises

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pursuant to the act, and the proceeds of which were insufficient to satisfy the principal and interest due on the mortgage, and which, by the terms of the mortgage, were payable, when demanded, at any time after the first Tuesday of May, 1815; it being a debt due, at the time of the application for relief, under the act, on the 17th of February, 1817

THIS was an action on a covenant contained in a mortgage, dated the 4th of May, 1814, given by the defendant to the plaintiffs, for securing the payment of one thousand dollars, conditioned to be paid, with the interest thereon, when the same should be demanded, at any time after the first Tuesday of May, 1815, and which the defendant covenanted to pay accordingly.

The declaration, after setting forth the indenture of mortgage, and that on the first Tuesday of May, 1817, the principal and sixty dollars interest remained unpaid, stated that the mortgaged premises, pursuant to the terms of the mortgage and of the act under which the loan was made, were sold, and that the proceeds of such sale were not sufficient to pay the principal and interest due on the mortgage; but after deducting such sale and the charges, &c., there remained in arrear and unpaid of the principal and interest, the sum of 796 dollars and 87 cents, of which the defendant had notice, and was required to pay; but that the defendant wholly neglected to pay the same, &c., contrary to his covenant, &c.

The defendant pleaded, 1. *Non est factum*: 2. That after the principal and interest were due and payable on the mortgage, and the cause of action, if any, had accrued to the plaintiffs, and before the exhibition of their bill, to wit, on the 19th of February, 1817, a creditor of the defendant (who was then in prison, and had been imprisoned for sixty days and upwards, upon execution in a civil action, &c.) applied to the recorder of the city of Albany, for relief, under the act for giving relief, in cases of insolvency, passed the 12th of April, 1813, (1 N. R. L. 460. sess. 36. ch. 98. sec. 9.) setting forth the proceedings under the act, and his conformity thereto, and his discharge, signed by the recorder of Albany, dated the 6th of May, 1817, &c., wherefore he prayed judgment, whether the plaintiffs ought to have and maintain their said action against him, &c.

The plaintiffs replied to the second plea, that the cause of action set forth in the declaration, and stated in the second and last breach assigned, accrued after, and not before, the time of granting the defendant's discharge, to wit, on the 22d of April, 1818, and this they prayed might be inquired of by the country. To this replication the defendant demurred, and the plaintiffs joined in demurrer, which was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The question here turns on the effect of the defendant's discharge.

If the mortgage money was due at the time of the defendant's discharge, though payable at a future day, the case would come within the provisions of the insolvent act, and the defendant would be protected by it. By the terms of the mortgage, the principal was payable at any time after the first *Tuesday* of *May*, 1815, when demanded by the plaintiffs; it was, therefore, a debt at the time of the application, by a creditor of the defendant, to the recorder of *Albany*, in *February*, 1817, under the 9th section of the insolvent act, although payment may not have been demanded at that time. This case, therefore, does not come within the principle decided in *Frost v. Carter*, (1 *Johns. Cas.* 73.) or the *Mechanics' & Farmers' Bank v. Capron*, (15 *Johns. Rep.* 467.) In those cases, the debts were not due; nor had they accrued to the plaintiffs, at the time of the discharge under the insolvent act; the defendants owed no debt to the plaintiffs at the time of their discharge, and *their eventual responsibility was altogether contingent. In the present case, the defendant stood indebted, and was liable to be sued long before his discharge. The only contingency in the case related solely to the amount for which the mortgaged premises should sell; and, independently of the mortgage operating on the land, the defendant stood personally responsible on his covenants. I do not perceive that this case differs from any other case of a debt secured by mortgage; the mortgagee may hold to his lien; but if he resorts to the person, and if the debt be due at the time of the discharge, though payable afterwards, the debtor is absolved by the discharge.

This debt was, in effect, due to the county of *Albany*; for, if any deficiency happens on a sale of the mortgaged premises, it is to be assessed and levied on the county where the deficiency happens, as other county charges. The plea, then, being good, and operating as a bar to the suit, the matters set forth in the replication do not present a state of facts impugning the discharge, and the defendant must have judgment. (a)

Judgment for the defendant.

(a) See 16 *Johns. Rep.* 254, note.

BRONSON *against* WOOLSEY

THIS was an action of *trover*, brought to recover the value of a vessel, called the *Penelope*. It was tried at the *Oneida*

The vessel of the plaintiff was employed by the defendant, a captain in the navy of the *United States*, in the service of the *United States*, in transporting ordnance and military stores of the *United States*, from *Oswego* to *Sackett's Harbor*, during the late war; and, by the direction of the defendant, was sunk in the harbor of *O.* in order to prevent the ordnance, &c. from falling into the hands of the enemy, who captured *Oswego*, and raised and carried off the vessel, &c. It was held that the defendant was not answerable to the plaintiff for the value of the vessel so sunk and lost.

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circuit, before Mr. Justice *Platt*, on the 15th of *June* 1818.

The vessel of the plaintiff, which was a schooner, was employed, in the spring of 1814, by the defendant, (who was a captain in the navy of the *United States*, during the late war with *Great Britain*,) for the service of the *United States*, in the transportation of ordnance and military stores, from **Oswego* to *Sackett's Harbor*, on lake *Ontario*. It was proved that, on the 6th of *May*, 1814, the fort and town of *Oswego* were captured by the *British* forces, who raised the schooner from the water in which she had been sunk, and carried her away, with all the ordnance and military stores, and all the boats and water craft found there, except such as were sunk in deep water. The deposit of ordnance, &c. was at *Oswego* falls, and the defendant was superintending the forwarding and transportation of the ordnance and military stores, and had under his command two lieutenants, several midshipmen, and about twenty seamen. He had ordered a midshipman, with some seamen, to take charge of the schooner; and, in case the enemy should succeed in carrying the fort, to sink her, with her cargo. The vessel was under the sole control of the plaintiff's captain and crew, without any interference on the part of the defendant, until the morning of the day on which the *British* made their assault, and had, immediately before, performed several trips between *Oswego* and *Sackett's Harbor*, in transporting property of the *United States*. On the alarm of the approach of the *British* towards the *Harbor*, and shortly before the assault, the schooner was removed by the captain and crew from the upper to the lower wharf, where the water was deeper. She was, afterwards, in the forenoon of the same day, removed back to the upper wharf, and sunk in about eight feet water, the deck remaining above the water. A midshipman and several sailors were just before on board of her. The witnesses were of opinion that the vessel might have been saved by sinking her in such deep water, as that the enemy could not, during the short time they remained, have raised her; and they stated that another schooner, the *Henrietta*, was sunk at the lower wharf, where the water was deeper, and was saved, as the enemy were unable to raise her. The fort was taken about noon, and the *British* reached the upper wharf about twenty minutes after the *Penelope* was sunk. The witnesses thought that the removing her back to the upper wharf, and sinking her there, was extremely injudicious. The judge charged the jury, that the interference of the defendant with the schooner was unlawful, and that he had no right to take possession of *her, or to deprive the master of the charge and control of her; that he was, therefore, answerable as a trespasser; and whether the enemy did, or did not, afterwards, capture the vessel, was immaterial. That the rule of damages was the value of the vessel, under the circumstances of the

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case, with interest or not, in the discretion of the jury. A verdict was found for the plaintiff for 3,830 dollars.

A motion was made to set aside the verdict, and for a new trial.

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F. C. White, for the defendant, contended, that the vessel being employed as a *transport* in the service of the *United States*, the defendant, as commanding officer at the place, had a right to do what had been done in regard to the vessel, to prevent her falling into the hands of the enemy. If the plaintiff has a remedy, he must seek it against the *United States*, not against the defendant. Transports employed by government are always under the direction and control of its officers. The nature of the case, and of the service, required it. The owner of the vessel does, from the very nature of the service, put his vessel, as in the case of a secret expedition; under the control of the government, to go wherever the exigency may require. A neutral vessel, employed as a transport, is identified with the enemy. (1 *Wheat. Rep.* 387. 391. 6 *Rob. Adm. Rep.* 420. 426. 2 *Azuni's Mar. Law*, part 2. ch. 1. s. 7.) A transport, then, is distinguishable from a common carrier, which is under the sole direction and control of the master and crew appointed by the owner. There is no distinction between a transport in a port, and one on the high sea. The moment she is employed in the public service, she is under direction of the public officer, whose duty it is to take care of the public property, and to promote the public service. In case vessels are pressed into the public service, and are shipwrecked, or taken by an enemy or pirate, the owner, if there be no fault of the commanding officer, must bear the loss arising from inevitable accident. (2 *Azuni*, 241. part 1. ch. 3. s. 6.)

Again; the defendant, as a public officer, can be liable only for negligence, or an improper use of his authority. *(*Ruan v. Perry*, 3 *Caines's Rep.* 122.) Trover will not lie; but if any action can be brought, it should be an action on the case. Besides, there has been no *wrongful* conversion of the property by the defendant. (6 *Bac. Abr. Trover*, B. *Bulst.* 280. 1 *Burr. Rep.* 31.)

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Again; this vessel being loaded with munitions of war, the defendant, as commanding officer at *Oswego*, had a right, in a case of imminent danger of capture, or necessity, to sink or destroy the vessel, to prevent the cannon, &c. from falling into the hands of the enemy. In the *Commonwealth of Pennsylvania v. Sparhawk*, (1 *Dall. Rep.* 357.) where a quantity of flour belonging to the appellee was taken by the officers of government, and removed by them, as was supposed, to a place of safety, but which afterwards fell into the hands of the *British*, *M'Kean*, Ch. J., held, that Congress might lawfully direct the removal of any articles necessary to the maintenance of the *American* army, or which might be useful to the enemy, and

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in danger of falling into their hands; for such a power was a natural and necessary consequence of war; and that the owner of the property was not, therefore, entitled to compensation for his loss. He said, "that the rights of *necessity* form a part of our law." Here the enemy were in the mouth of the river, within a few hours' march of the place, and the capture certain. (*Vattel's L. of N. b. 3. ch. 15. s. 232.*) The *necessity* of the case is manifest

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Sill, contra. The plaintiff has shown such a *conversion* of the property as is sufficient to support the action of trover. Assuming the right to dispose of, or to exercise dominion over, the property of another, is a conversion of it. (*Bristol v. Burt, 7 Johns. Rep. 254.*) The only question is, whether the defendant, from his office and station, is protected from the action. Admitting the law of necessity, yet it must be a necessity which grows out of the right of self defence, and from an immediate and pressing exigency. An officer of the government is not justified in taking or destroying private property, on any prospective calculation that it might become useful to the enemy. If he rests his *defence on the plea of necessity, he must show it to be urgent, immediate, and irresistible. This is not such a case. Further, the defendant must prove, that he was an officer having power and authority to destroy the property. There was a regular fort at *Oswego*, and the defendant was not stationed there. He merely commanded a party of men employed in superintending the transportation of munitions of war to *Sackett's Harbor*. He was there casually, and for a temporary purpose. He had no authority to order the vessel to be destroyed as a measure of precaution. That power was in the commanding officer of the fort.

Again; here was very gross negligence in the defendant. The sinking of the vessel might have been delayed, at least, until she could be sunk in such deep water that the enemy could not weigh her up again. A public officer is liable for negligence, or the want of due discretion. (2 *Cranch*, 133. 3 *Cranch*, 458.) There is no distinction, in this case, between civil and military officers. (2 *Cranch*, 179.) *Sparhawk's case* (*Dallas*, 362.) arose during the revolutionary war, and its circumstances were very different from the present. In the case of *Ruan v. Perry*, the defendant was exercising a well-known and established right under the law of nations.

As to the doctrine cited from *Azuni*, of the right to press *neutral* vessels into the service of a belligerent, without compensation in case of loss, if it were necessary to discuss the point here, the soundness of it might well be doubted. But this is a suit between two of our citizens; and the question is, whether the defendant had power sufficient to justify his conduct.

As to the objection to the form of the action: The case of

Murray v. Burling (10 Johns. Rep. 172.) shows clearly that *trover* lies. If a man, entrusted with property for a particular purpose, goes beyond his authority, and, also, contrary to his orders, it is a conversion of the property, and *trover* lies. (*Syed v. Hay*, 4 Term Rep. 260. 6 East, 540. 1 Johns. Cas. 406.)

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N. Williams, in reply, said, that the principle on which it was attempted to support this action, would, in effect, obstruct *the operations of war, by defeating the most important military plans; that not only the writers on the law of nations, but the common law courts justified the taking and destroying of private property in cases of necessity. Where it is a measure of mere precaution, government, no doubt, must make good the loss; but where it is a case of necessity, in order to defend the country against an enemy, there was no remedy. The defendant, instead of sinking the vessel, would have been justified in burning her, rather than suffer these warlike stores to have fallen into the hands of the enemy. The cases cited from *Cranch* were admiralty cases; and the defendants acted without any power or authority whatever.

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SPENCER, Ch. J., delivered the opinion of the court.

The only ground on which the defendant can be held responsible, is this; that he gave directions to an inferior officer to take charge of the plaintiff's schooner, and, in case the enemy should succeed in carrying the fort, to sink her, with the cargo; and that event having occurred, the schooner was sunk. The *gravamen* is, that she was sunk in too shallow water, so that the enemy raised her, and took her off as a prize; and that, had the plaintiff's master continued to keep charge of her, she would have been so sunk, as to prevent her being raised, and thus she would have been preserved to the plaintiff.

Was the defendant authorized, under the circumstances of the case, to order the schooner to be sunk; and if he was, would he be responsible for the imperfect execution of his orders?

The defendant was a captain in the navy of the *United States*, and was, at the time of the injury complained of, at or near *Oswego*, superintending the forwarding and transportation of ordnance and military stores, from *Oswego* to *Sackett's Harbor*, and had with him, under his command, several officers and sailors. The plaintiff's schooner was loaded, under the defendant's directions, with heavy guns, shot, &c. The schooner was navigated by the plaintiff's master and crew, without any interference from the defendant, and she had performed immediately before, several *trips between *Oswego* and *Sackett's Harbor*, in transporting property of the *United States*.

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There is proof in this case, that the fort of *Oswego*, having been taken by the enemy, the vessel was sunk, under the defendant's orders, by a midshipman; and it appears that she was thus sunk in shoal water, and was afterwards raised and carried off by the enemy; and it is rendered quite probable, as far as the opinion of witnesses can ascertain, that had she been left under the management of the master, she might and would have been so sunk as to have escaped capture.

It has not, and cannot be pretended, that the defendant was influenced, in giving the orders, by any other motives than those proceeding from a laudable zeal for the public service, and with the sole intention of preventing the ordnance and munitions of war on board the plaintiff's schooner, from falling into the hands of the enemy. The schooner, being in the transport service of the *United States*, was subject to the defendant's orders and control, as much as if she had been navigated by officers and men in the service of the *United States*. In the case of the *Commonwealth of Pennsylvania v. Sparhawk*, (1 *Dallas's Rep.* 362.) Ch. J. *McKean* very justly observes, "the transaction, it must be remembered, happened *flagrante bello*, and many things are lawful in that season which would not be permitted in time of peace." Again, he says, "it is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity form a part of our law." In time of war, bulwarks may be built on private ground, because it is for the public safety. In the present case, the vessel was not ordered to be sunk, to deprive the owner of his property, or to appropriate it to the defendant's use, but she was ordered to be sunk, from the paramount consideration of the public welfare; it was to secure her from capture by the enemy; that the vessel, afterwards, fell into their hands, was an event involuntary, and perfectly accidental.

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In this case, the public property, which the defendant was bound to preserve from capture, was placed on board the plaintiff's vessel. Was the defendant to fold *his arms, and suffer this property, so necessary to the *United States*, to be preserved, or not, at the option of the plaintiff's master? It seems to me the answer must be, that he had a right, in order to secure the ordnance and munitions in the vessel, to command her, either to proceed to a place of safety, or to be sunk; and that he was not bound to rely on the discretion of the plaintiff's master to do this or not. The orders given did not deprive the master of a right to aid and advise, as to the best course to be pursued; and, although the witnesses seem to suppose that she might and could have been sunk in such a way as to baffle all attempts to raise her by the enemy, it is extending speculation too far, to pronounce that she would have been so sunk.

The defendant gave his orders under a pressing exigency.

when there was no time to wait for the directions of the president; and, according to the law of nations, he represented the sovereign or executive power, by virtue of an authority tacitly given by his commission. (*Vattel*, b. 3. ch. 2. s. 7.) Had the president of the *United States* been present, and given the order which the defendant gave, it will hardly be insisted that he would have been a trespasser.

It would seem, according to *Vattel*, (b. 3. s. 232.) that this act being done voluntarily, and by precaution, the damages are to be made good to the owner by the sovereign power; because the party suffering, in such case, should bear only his quota of the loss. But we are clearly of opinion that the defendant is not responsible. There must be a new trial; the costs are to abide the event of the suit.

New trial granted.

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*BIRKBECK *against* THE HOBOKEN HORSE FERRY [* 54]
BOATS

THIS was a proceeding by attachment, commenced in the Mayor's Court, of the city of *New-York*, and removed into this court by *certiorari*, against two horse ferry boats, under the act, sess. 22. c. 1. (1 *N. R. L.* 130. 2 *Rev. S.* 493.) *authorizing the arrest of ships or vessels, for debts contracted by the master, owner, or consignee, for, or on account of, such ships or vessels, in this state*; and the act of the 28th of February, 1817, (sess. 40. c. 60.) amending the former act. The first section of the act, sess. 22. c. 1. provides, "that ships or vessels of all descriptions, built, repaired, or equipped in this state, and owned by any person or persons *not resident* therein, shall be liable for all debts contracted by the master or commander, owner or consignee, thereof, on account of any work done, or any supplies or materials furnished by any mechanic, tradesman, or others, for, on account, or towards the building, repairing, fitting, furnishing or equipping, such ships or vessels; and that debts, so contracted, shall be a lien upon such ships or vessels, their tackle, apparel, and furniture; and shall have preference to any and all other debts, due and owing from the owner thereof, except mariners' wages." And, by the fifth section, it is further enacted, "that the said lien shall cease immediately after such ship or vessel shall have left this state." The amending act extends the provisions of the former act, "to ships and vessels owned by persons *resident* within this state;" and, also, provides, "that the said lien shall, in no case, endure beyond twelve days after such ship

The act, sess. 22. c. 1. (2 *R. S.* 493.) *authorizing the arrest of ships or vessels, for debts contracted by the master, owner, or consignee, for, or on account of, such ships or vessels, in this state*; and the act, sess. 40. c. 60. amending the same, extends only to ships or vessels navigating the ocean, or at most, to such as sail coastwise from port to port: and a ferry boat, plying across a river, as from *New-York* to the opposite shore of *New-Jersey*, is not liable to attachment under these statutes

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or vessel shall leave the port, in which the same may have been so arrested."

The plaintiff's declaration stated that, on the 17th of *February*, 1817, and on divers days and times, between that day and the 3d day of *November*, in the same year, at the request of the owners of the boats or vessels known by the description of *The Hoboken Horse Ferry Boats*, being two in number, (and then, with their tackle, &c., in the custody of the sheriff of the city and county of *New-York*, by virtue *of a warrant issued by the recorder of *New-York*, commanding the sheriff to attach the same, lying in the city of *New-York*,) he, by himself and his servants, as blacksmiths, did and performed work and labor, care and diligence, in and about the building, and equipping of the said boats, and found materials for the same, amounting, in the whole, to 2923 dollars and 25 cents; and the plaintiff averred, that the boats had not been out of, or departed from, or left the port of *New-York*, since the performance of the work and labor, and furnishing of the materials, and also averred a demand of payment from the owners, and their refusal.

Swartwout and others, *Brown* and *Hone*, appeared and defended in respect of their several interests. *Swartwout* and others, as owners of the boats, pleaded, 1. *Non assumpserunt*. 2. That the supposed debt, or lien, of the plaintiff, arose on, or about, the 2d of *November*, 1817; that the boats were arrested on the 2d of *December*, in the same year; and that, before the arrest, to wit, on the 10th of *November*, the boats left the state of *New-York*, whereby the supposed lien of the plaintiff ceased. To this plea the plaintiff replied, denying that the boats had left the state, &c.

The defendant *Brown* pleaded, that the two boats, respectively called the *Hoboken* and the *Manhattan Island*, were built by him, for the *Swartwouts*, and that he furnished the materials; that the *Swartwouts*, for securing to him the payment of 6,000 dollars, part of the consideration for building the boats, executed two bottomry bonds to him, each conditioned for the payment of 3,000 dollars, one, dated the 1st of *May*, 1817, upon the *Hoboken*, and the other, dated the 1st of *June*, 1817, upon the *Manhattan Island*; that the said bonds were executed and delivered on the days on which they respectively bear date; that the lien of the plaintiff arose on, or about, the 2d of *November*, 1817, subsequent to the execution and delivery of the said bonds, and the prior lien of this defendant, arising from his being employed to build the boats, &c.; and that neither of the sums secured by the said bonds, or any part thereof, have been paid and satisfied. To this plea, the plaintiff replied, that he executed, and furnished all the iron work, and iron necessary for the equipment of the said boats, from the commencement, and during *the progress of the building and equipping of them, to wit, on the 17th of *Feb-*

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ruary, 1817, and on divers days and times between that day and the 3d of *November*, in the same year: and that his debt and lien arose on the 17th of *February*, and not on the 2d of *November*, as alleged by the defendant *Brown*.

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The defendant *Hone* pleaded, 1. After stating the lien of *Brown*, and the execution of the bottomry bonds, that, on the 20th of *November*, 1817, *Brown*, in consideration of two sums of 3,000 dollars each, to him in hand paid, assigned the two bonds to this defendant, by assignments endorsed thereon respectively; and he insisted on the priority of the lien of *Brown*. 2. The second plea repeated the material allegations of the first plea, and also stated, that on the 19th of *November*, 1817, it was agreed between this defendant and the *Swartwouts*, that the defendant should advance to *Brown*, 6,000 dollars, and take from him an assignment of the bonds, and should lend to the *Swartwouts* 19,000 dollars, and receive from them, as his security, a mortgage or hypothecation of the boats; that, in pursuance of this agreement, the defendant, on the 20th of *November*, paid to *Brown* the sum of 6,000 dollars, who, the same day, assigned the bonds; and, also, on the same day, paid to the *Swartwouts* 19,000 dollars, who executed and delivered, on the 26th of *November*, an indenture of mortgage or hypothecation of the boats; and that neither of these sums, or any part thereof, had been paid or satisfied. There were replications to each of these pleas, which were essentially the same as the replication to the plea of the defendant *Brown*, except that they referred to the additional matter introduced by the pleas of the defendant *Hone*.

Issue was joined on the replication to the plea of the defendants, *Swartwout* and others. The defendants, *Brown* and *Hone*, demurred generally to the several replications to their pleas, and the plaintiff joined in demurrer. The cause was submitted to the court without argument.

Per Curiam. The plaintiff has proceeded by attachment against two ferry boats, the *Hoboken* and the *Manhattan Island*, under the act, (1 N. R. L. 130. 2. R. S. 493.) and it appears that *these boats ply between the island of *New-York* and *Hoboken*, in the state of *New-Jersey*.

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The parties are at issue, on a demurrer to the replications, to which various exceptions have been taken; but, without considering these exceptions, we are of opinion that the plaintiff's proceedings cannot be sustained, on the ground that the act, and the one amending the same, (sess. 40. ch. 60.) do not extend to vessels of this description.

The first section of the first act extends to ships or vessels of all descriptions, built, repaired, or equipped, in this state, and owned by any person not resident therein; and the amendatory act extends the former act to ships or vessels owned by persons resident within this state.

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The general terms "ships or vessels of all descriptions, built, repaired, or equipped in this state," are qualified and restricted by other parts of the acts to such ships or vessels as are built, repaired, or equipped in this state, for the navigation of the ocean, or, at all events, to such vessels as sail coastwise, from one port to another port.

This, we think, is manifest from all the provisions of the statutes; the fourth section of the first act provides that, upon giving the security therein mentioned, the vessel shall be discharged from the attachment, and *be permitted to proceed on her voyage*. The fifth section declares, that the lien shall cease immediately after *such ship or vessel shall have left this state*; and the amended act provides, that the lien shall, in no case, endure beyond twelve days after such ship or vessel shall leave the port in which the same may have been so arrested. The first act was confined to ships or vessels owned by persons residing out of the state, which, independently of the other provisions of the act, would operate only on such vessels as performed voyages on the ocean, or from one port to another. The subsequent act, extending the same remedy to ships or vessels owned by persons resident within the state, preserves the distinction between vessels that do, and those that do not, leave the port, except temporarily, or for an hour or two.

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This construction gives full effect to the statutes, in the utmost latitude to which the legislature intended the remedy, by attachment, should be extended. It embraces ships and *vessels of all descriptions engaged in foreign trade, or performing voyages coastwise, from state to state; but it excludes those boats which never go out of sight of the port from which they move, and are used merely as ferry boats to cross a river.

The present case comes neither within the spirit or intention of the acts, nor the mischiefs intended to be remedied. We perceive no greater reason for subjecting boats of this description to a lien by attachment, than a wagon or coach, for repairs done to them.

Judgment for the defendants.

BRUEN *against* MARQUAND.ALBANY,
August, 1819.

BRUEN

v.

MARQUAND.

THIS was an action of *assumpsit*, brought by the plaintiff, as holder of a promissory note, against the defendant, as endorser. The defendant pleaded *non-assumpsit*, and gave notice of a set-off. The cause was tried at the *New-York* Sittings, on the 28th of *November*, 1818, before the late chief justice. The note was dated *April* 6th, 1816, drawn by *Shelton & Beach*, for 500 dollars, payable to the defendant, sixty days after date, and endorsed by him. It appeared that *M. Bruen & Sons* were second endorsors, and that the note had been discounted at the *City Bank*, and passed to the credit of that firm, and was, afterwards, taken up by them after it became due. The firm consisted of the plaintiff and his two sons, *George M. Bruen* and *Harman Bruen*. But the second endorsement was erased, before the trial.

*The defendant gave in evidence the following receipt: "Received, *New-York*, *October* 26th, 1816, from *Isaac Marquand*, *Edward W. Wilkins*, and *James M. Hoyt*, assignees to the estate of *Shelton & Beach*, the sum of 225 dollars, being a dividend of 45 per cent. on the amount of a debt secured to be paid, as in the first class of creditors specified in the assignment of *Shelton & Beach* to them. *M. Bruen & Sons*."

The defendant, also, gave in evidence a deed of assignment and release, and the schedules thereunto annexed, made the 8th of *June*, 1816, between *Shelton & Beach*; of the first part, *Marquand*, *Wilkins* and *Hoyt*, of the second part, and the creditors of *S. & B.*, named in the schedule A. annexed, of the third part. By this deed *S. & B.* assigned over all their property to the parties of the second part, in trust for their creditors, who, in the schedule, were distinguished into three classes; those in the first class were to be first paid out of the proceeds of the property. The deed was executed under the hands and seals of the parties, and, among other creditors, by *George M. Bruen*, and the defendant. In the schedule (A.) of the debts due by *S. & B.* of the first class, was written as follows: "*Isaac Marquand*, endorsed to *M. Bruen & Sons*, 500 dollars." By the deed, the parties of the third part, released and discharged the parties of the first part, *S. & B.*, of and from all actions, debts, dues, and demands whatsoever, &c.

The plaintiff's counsel objected to the deed and release being evidence, as it was not executed by all the partners of the firm of *M. Bruen & Sons*, but by one of them only. The chief justice overruled the objection, and the deed was read, on proving the execution thereof by *George W. Bruen*, one of the

One partner of a firm may sign a deed of composition, and release a debt due to the partnership.

Where a deed of composition was entered into between *S. & B.* debtors, and their creditors, by which the former assigned all their property to *M.* and others, in trust for their creditors, and who, by the

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same instrument, released *S. & B.* from all their debts, &c., which deed was executed by *M.* as a trustee and creditor, and who was endorser of a promissory note drawn by *S. & B.* of which *B. & Sons*, partners in trade, were holders, described in a schedule of debts annexed, as due to *M.*, to the deed, which deed was also executed by *G.*, one of the firm of *B. & Sons*, it was held, that the execution of the deed, by the holders of the note, was not a release of *M.* the endorser; for upon the true construction of the whole instrument, *M.* having signed it as creditor, as well as trustee, had thereby relinquished all

right of action against the makers, and was to be considered as assenting to a discharge of the makers by the holders also, with a full understanding that his liability to them, as endorser, was not to be thereby impaired.

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said firm, and by the other parties. The chief justice charged the jury, that, if they believed that the note for 500 dollars, mentioned in the schedule annexed to the deed of assignment, as endorsed by the defendant to *M. Bruen & Sons*, was the same note produced at the trial, they ought to find for the defendant; and the jury found a verdict for the defendant.

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E. Pendleton for the plaintiff. Admitting that the plaintiff was a party to the assignment, the release does not, on *the face of it, purport to release the rights or claims of *M. Bruen & Sons*, or of *M. Bruen*: it can only release any individual claim which *George M. Bruen* might have against *S. & B.* A discharge of an endorser, or acceptor, is never implied. Nothing but an *express* declaration of the holder is sufficient for that purpose. (*Dingwall v. Dunster*, *Doug.* 247. 2 *Campb. N. P. Rep.* 185, 136.)

Again; the plaintiff cannot be deemed a party to the assignment, by the execution of it by his partner, who has no authority to bind his co-partner by deed. (4 *Term Rep.* 313. 7 *Term Rep.* 267. 9 *Johns. Rep.* 285.)

But if the release is to be considered as releasing the rights of *M. B. & Sons*, as holders of the note, yet, as the plaintiff and defendant were both parties to, and assenting to, the release of the maker, their respective rights, as between each other, cannot be affected by it. Indeed, it is apparent, from the release itself, that it was the understanding of the parties, that the amount of this note was to be provided for by the defendant.

Slosson, contra. The schedule, annexed to the assignment and release, expressly states, that *M. Bruen & Sons* were the holders of the note; and, therefore, on the face of the instrument, they were the creditors and persons to be paid, and the fund was to be distributed among the creditors of *S. & B.*, the makers of the note. One partner may release a debt due to the copartnership. (*Pierson v. Hooker*, 3 *Johns. Rep.* 68. *Buckley v. Dayton*, 14 *Johns. Rep.* 387. 4 *Binny's Rep.* 375.) If the holder of a bill or note compounds with or discharges the acceptor, or maker, he cannot, afterwards, look to the other parties to the bill or note. (*Lynch v. Reynolds*, 16 *Johns. Rep.* 41.) It is said that the defendant, being a party to the assignment, cannot set up the release. But the assignment and release is, in effect, a *satisfaction* of the debt. (*Ex parte Wilson*, 11 *Vcsey*, 410. 2 *Caines*, 121. 7 *Johns. Rep.* 209. 2 *Saund.* 48. note. 13 *Johns. Rep.* 286.)

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D. B. Ogden, in reply. That the deed is so executed as to release a partnership debt cannot be denied; but it must *appear, on the face of the instrument, that it is a partnership debt. There is nothing which shows this, except the schedule, and that describes the note as if it were to be paid to the de-

pendant. In *Pierson v. Hooker* the release was in the partnership name.

It is true that, if the holder of a note or bill does discharge the maker, or acceptor, or drawer, he discharges all subsequent parties. The reason is, that the maker is considered as the original debtor, and the endorser as a surety; and that, by discharging the original debtor, the surety loses all right to have recourse against him. (3 *Exp. N. P. Rep.* 2 *Bos. & Pull.* 61. 6 *Miss. Rep.* 35.) But if the endorser, or surety himself, agrees to the discharge of the maker, the reason does not apply; he cannot object a discharge of the maker, to which he has consented. All the cases cited go upon the ground, that the maker has been discharged *without the assent* of the endorser.

Chitty, also, puts it on that ground. Why should not the endorser be liable, if he consents to the discharge of the maker? It is just and reasonable; and it is the fair construction of this assignment and release, that the defendant should remain liable. All the fund arising from the property of the makers of the note, went into the hands of the defendant and his co-trustees.

But we are told this is a release, and that, therefore, the *debt* is satisfied. How? By an arrangement made between all the parties for the benefit of the endorsee, the defendant?

VAN NESS, J., delivered the opinion of the court. The assignment must be construed with reference to the schedule, and, taking both into consideration, there can be no doubt that *G. W. Bruen* executed it in behalf of the firm, of which he was a member. He had no private demand of his own against *Shelton & Beach*, and the only debt against them in which he was interested was the note in question, of which the firm were the holders. The schedule specifies a note of 500 dollars, endorsed by the defendant, and negotiated to the firm, which, no doubt, and so the jury has found, is the note in question. To this may be added the *receipt, by the firm, of a dividend received from the trustees, which most decisively shows that *G. W. Bruen*, in becoming a party to the assignment, meant, and intended, to act in behalf of the partnership. There can be no doubt that one partner is competent to enter into such a composition as was made in this case, and to release a partnership debt. The question then arises, whether or not the release and discharge of the maker is, in this case, a release of the defendant, the endorser? The general rule is not disputed, but it is argued that this case is not within it. The reason for holding the endorser discharged, by the discharge of the maker, certainly does not apply here, viz. that the remedy by the former against the latter is materially affected or taken away; because the defendant, who is a party to the assignment, not only as a trustee, but as a creditor to a large amount, as a creditor, released *Shelton & Beach* from their liability over to him, on this, as well as other notes, en-

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dorsed by him. He has, therefore, by his own act, relinquished all the remedy he might otherwise have had, in case of his being compelled to pay the whole, or any part, of this note. This is a question of intent, upon the whole instrument. There is no express release of the defendant; and the release of the maker is a discharge of the endorser, by construction only; and if the intention of the parties was to preserve the liability of the endorser, it was competent for them to do so. The defendant is one of the assignees: the funds are to go into his hands, and the note in question is one of the debts which is to be first paid. The assignment contains material stipulations between the three parties, and the defendant must be considered as assenting to the discharge of the makers of the note by the then holders of it; and, it appears to me, with a full understanding, that his liability, as endorser, was to be left unimpaired. The note in question is inventoried, not specifically, as a debt due to *Bruen & Co.*, but thus, "*Isaac Marquand endorsed to M. Bruen & Sons, 500 dollars;*" this, it appears to me, is a plain and unequivocal recognition, by the defendant, that he considered *Shelton & Beach* to be *his* debtors for the amount of the note; and that his liability, as endorser, was not to be extinguished by the discharge of the makers. If *this were otherwise, the note would have been mentioned as a debt due from *Shelton & Beach* to *M. Bruen & Co.*, and not as a debt due from them to the defendant. The intent of the parties clearly appears to have been, that both the holders of this note, and the defendant, should set the makers free, but that the remedy against the endorser should remain. It was, no doubt, for this reason that the debt in question was put in the first class. The makers intended to secure (as far as they could) their endorsors, as honorary creditors. As between the holders of this note, and the makers, there was no reason for giving it a preference; but, as between the maker and endorser, it was otherwise. I am quite satisfied that this is the true construction of the assignment, and that the defendant must be considered as continuing liable as endorser; and he must look for indemnity to the funds in his hands. (a)

New trial granted.

(a) One partner, as such, cannot bind his co-partner by writing, under seal, to comply with an award; yet, where an award is made pursuant to such submission, and the amount awarded in favor of the partnership is accepted by one partner, who endorses upon the award a receipt in full, it operates as a release by one partner, or, as an accord and satisfaction, and is a bar to the partnership claim. *Buchanan v. Curry*. 19 Johns. Rep. 137. See also *Cram v. Caldwell*, 5 Cowen, 489. *M'Bride v. Hagan*, 1 Wendall's Rep. 326. *Karthans v. Ferrer*, 1 Peter's Rep. 228.

BRONSON and others *against* EARL, late Sheriff of Onondaga.ALBANY
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IN ERROR to the Court of Common Pleas of the county of *Onondaga*. The plaintiffs brought an action of debt against the defendant, as sheriff, for the escape of one *James M Kellops*, from the gaol liberties of the county.

The defendant pleaded *nil debet*, and gave notice, that if *M.* did escape, he immediately retook him, on fresh pursuit, and that *M.* immediately returned into the defendant's custody, before the suit was commenced; and filed an affidavit with the plea, that if *M.* did escape, it was without the consent, privity, or knowledge of the defendant.

At the trial in the court below, in *February*, 1818, the plaintiffs produced the record of the judgment against *M.*, of **September* term, 1816, and the *ca. sa.* issued thereon, returnable in *February*, 1817, with the sheriff's return thereon, endorsed *cepi corpus in custodia*. *R. White*, a witness, testified, that on the 10th of *October*, 1817, he saw said *M.* off the gaol limits, and while he was so off the liberties, *J. Bronson, jun.* handed him a paper, which he carried to and left at the coroner's office, with his wife, in the absence of the coroner, and immediately returned, and still saw *M.* off the limits, milking his cow; and that *M.* immediately after returned to the gaol liberties. *J. B.* testified, that at the time mentioned by the witness, *White*, he saw *M.* off the limits, and immediately handed to *White* a *capias ad resp.* in favor of the plaintiffs against the defendant, which he had received a few days before from the plaintiff's attorney, with directions not to deliver it to the coroner, until he should see *M.* off the liberties, and told *White* to deliver it to the coroner; and the witness remained at the same place, until *W.* returned from the coroner's, during all which time *M.* was off the limits; but immediately thereafter returned to the liberties.

The *capias ad resp.* against the sheriff, which was produced, was directed to the sheriff of the county of *Onondaga*, instead of the coroner; and the sheriff endorsed his appearance thereon, the next day after the escape, and after *M.* had returned to the gaol liberties. The jury found a special verdict, stating the above facts, on which the court below gave judgment for the defendant.

The cause was submitted to the court, on the record and return, with the points stated, without argument.

Per Curiam. The defendant cannot take advantage of the misdirection of the *capias*, after he has appeared to it and pleaded; it being a defect in the process, which is clearly amend-

The defendant cannot take advantage of a defect in the direction of a *capias ad resp.* after he has appeared to it, and pleaded; the defect being amendable.

Where a *capias ad resp.* against a sheriff for the escape of a prisoner in

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execution, was delivered to the wife of the coroner at his house, (the coroner being then absent,) while the prisoner was actually off the limits of the gaol liberties, though he immediately thereafter returned, it is a sufficient commencement of an action against the sheriff, before the return of the prisoner to the gaol liberties, so as to make the sheriff liable for the escape.

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able. (a) (*Tidd's Pr.* 91. *Stra.* 155. 1 *Hen. Bl.* 222. 8 *East's Rep.* 255.) The ground upon which the court below probably gave judgment for the defendant was, that they did not consider the suit to have been actually brought before the prisoner (*Mr Kellops*) had returned to the limits. The writ, in this case, was actually *made out before the escape, and put into the hands of a third person, to be delivered to the coroner to be served, at such time as the prisoner should be found to have left the gaol liberties. It was, accordingly, carried to the coroner's house, and left, in his absence, with his wife, during the time of his escape, and before the prisoner had returned; and there can be no question that this is, to all essential purposes, to be deemed the commencement of the action. If the coroner had personally received the writ, before the prisoner returned, there could be no doubt the sheriff would be liable. The delivery of the writ to his wife, at the usual place of his abode, is equivalent to a personal delivery, and such a commencement of the action as would save a debt from being barred by the statute of limitations. The writ, in this case, was placed where it might have been executed, and some efficient act done under it. (*Van Vechten v. Paddock*, 12 *Johns. Rep.* 181.) The suing out of the writ has been held, in several cases, by this court, to be the commencement of the suit, and, although there may be some uncertainty, or ambiguity in the term "suing out the writ," yet there can be no doubt, that the delivery of the writ to the proper officer, or leaving it at his house, as in this case, for the purpose of being executed, is to be deemed the actual commencement of the suit. (3 *Johns. Cas.* 145. 1 *Caines*, 69. 2 *Johns. Rep.* 342. 3 *Johns. Rep.* 42. 3 *Caines*, 133.)

Judgment reversed. (b)

(a) Vide *Low v. Little*, post, note (a):

(b) An action against the sheriff, for the escape of a prisoner in execution from the liberties of the gaol, is not well commenced by handing a writ to a person with directions to go and see the prisoner off the limits, and then to deliver the writ to the coroner. The writ must be either actually delivered to the coroner, or left at his office, or be issued and sent to him, with the absolute, positive and unequivocal intention to commence the suit, while the prisoner is off the limits; and to support the action for an escape, the fact of the prisoner being off the limits, must be affirmatively, and satisfactorily shown, by direct and positive proof. Nothing will be intended or inferred, unless it be plain and irresistible, to charge the sheriff. *Visscher v. Gansevoort* 18 *Johns. Rep.* 496.

ALBANY,
August, 1819*JACKSON, *ex dem.* WELDON, *against* HARRISON.

JACKSON

v.

HARRISON.

THIS was an action of ejectment, tried before the late chief justice, at the *New-York* sittings, in *December*, 1818.

The plaintiff gave in evidence an indenture of lease, made the 1st of *June*, 1813, between the lessor and the defendant, by which the lessor devised to the defendant a lot of ground, with the buildings thereon, in the city of *New-York*, for the term of seven years, from the 1st of *May*, then last past, at the annual rent of 250 dollars, payable quarterly; and paying, also, *all taxes, assessments, levies, or impositions whatsoever*, which shall or may be assessed, levied, or imposed upon, or grow payable out of, or for, the demised premises, or any part thereof, during the term. And it was *provided*, and agreed that, in case the rent, or any part thereof, should remain due, and unpaid, for twenty days after the same ought to be paid; or if any taxes, levies, &c. which should be rated or assessed on the premises, and should be behind and unpaid, for the like space of time, after the time the same ought to be paid; or if the lessee, his executors, &c. *should assign over, or otherwise part with, the lease or the premises demised, or any part thereof*, to any person or persons whatsoever, without the consent of the lessor, his heirs or assigns, or his attorney, first had and obtained in writing, under his or their hands and seals; then, in either of the said cases, it should be lawful for the lessor, his heirs, &c. to *re-enter* into, and upon, the demised premises, &c., or to distrain, &c. And it was further agreed, that, in either of the cases above mentioned, if the lessee, his executors, &c. should fail to perform any of the covenants, conditions and provisoes, *contained in the lease, &c. that then the lease and the estate thereby granted, should cease, determine, and become, utterly void, if the lessor should elect so to consider it. The lessee *covenanted* to pay the rent, and the taxes, &c. and make all necessary repairs, and to surrender the premises, at the expiration of the term, in good repair; fire, war, or other inevitable accident, excepted; with all repairs made thereon during the term. And it was further covenanted and agreed that the lessee should not make any material alteration in the buildings, nor take down any partition or wall, in or about the same, without the consent of the lessor

Where a lease for the term of seven years, contains a condition that the lessee should not "assign over, or otherwise part with, the indenture, or the premises thereby leased, or any part thereof, to any person," &c., and a clause of re-entry, and of forfeiture, for a breach of the condition, no forfeiture is incurred by an under-letting for two years, or a period short of the whole term; as the words of the condition are to be construed to mean an assignment of the premises, or a part of them, for the whole term.

And where one of the conditions was, that the les-

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see should pay all taxes, &c. it was held, that the lessor had no right to *re-enter* for a breach of the condition, without showing a demand of payment of the tax within the period required by law, in order to create a forfeiture.

Nor can the lessor re-enter,

on the ground of a forfeiture, for the non-payment of rent, without showing a demand of the rent due on the last day, of the tenant, on the premises, a convenient time *before sun-set*, &c., or a strict compliance with all the formalities required by the common law; his claim being regarded as *stricti juris*. Proving a demand of the tenant, at his house, on the premises, in the *afternoon* of the last day, is not sufficient.

Where, at the bottom of a lease containing a clause of re-entry, for non-performance of the covenants, conditions, &c., the lessee agreed not to make any alterations in the buildings, without the consent of the lessor, this was held to rest merely in covenant, and was not a condition, for a breach of which the lease was to be forfeited.

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his heirs, &c., or his attorney, for that purpose, in writing, first had and obtained.

John Reid, a witness for the plaintiff, testified, that he was the agent of the plaintiff for nearly *five* years, during which time, the defendant never paid the rent punctually; that, in *December*, 1814, the defendant having neglected to pay the direct tax of the *United States*, assessed on the premises, they were advertised for sale; and, to prevent a sale, the witness paid the tax, which has never been repaid to him by the defendant; that no rent had been paid since *August*, 1816; that the witness went to the defendant's house, the premises in question, on the first and twentieth days of *November*, 1816, in the afternoon of each of those days, and demanded the quarter's rent then due; but the defendant answered, that he could not pay; that the witness went again to the premises on the first and twentieth days of *February*, 1817, in the afternoon of each of those days, and demanded the rent, but obtained only promises from the defendant. In *February*, 1817, part of the house was consumed by fire; and it was awarded by arbitrators, that the Fire Insurance Company should pay 650 dollars, on account of the damages. The defendant made the repairs, which amounted to 600 dollars; and, on the 14th of *May*, 1817, he agreed to accept one half of the sum awarded to be paid by the Insurance Company, as a compensation, in full, for the repairs. The witness received the 650 dollars, and tendered the one half of that sum to the defendant, in full for the repairs; but the defendant refused to accept it, and insisted on being paid the whole sum of 600 dollars, for repairs. The witness, afterwards, *proposed to deduct the amount due for rent from the 325 dollars due to the defendant for repairs, but the defendant refused to limit his claim for that sum, insisting on the full amount of 600 dollars.

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It was proved that one *Kelly* occupied one of the buildings, as an under tenant, for eighteen months, or two years. The witness also proved that, some time previous to *August*, 1816, the defendant made alterations in the house, by cutting off about eight feet of a stack of chimney, in the lower story, which stood in the partition between the two front rooms of the two tenements, one of which was used as a store, and by putting upright posts under the chimney to support it, and taking down the partition between the rooms, and throwing the whole into one store. This suit was commenced in *August* term, 1818. It was admitted that the buildings, as now repaired, since the fire, were in a better state than before.

The defendant proved that, before the suit was brought, he offered to the wife of the lessor, (the lessor himself having been abroad, out of the *United States*, for more than seven years,) to allow the rent then due, together with a quarter's rent in advance, to be deducted out of the sum claimed by the defendant, for repairs, if she would pay to the defendant the

balance of his bill; and that she referred the defendant to her agent, *Reid*, who refused to agree to the proposal.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated.

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Wilson, for the plaintiff. As to the clause of re-entry by the lessor, there is a difference between a lease for *life*, and a lease for *years*. In regard to the former, a breach of the condition renders the lease voidable; but in the latter case it is void; and, being forfeited, it cannot be set up again, by an acceptance of rent after the breach of the condition, nor by any other act. (*Plowden*, 133. 1 *Saund.* 287. n. 16.) Here there has been a breach of the condition: 1. In the non-payment of taxes: 2. By assigning the premises: 3. By non-payment of rent: 4. By alterations in the buildings. So that the lease is forfeited and void. (1 *Campb. N. P.* 20. 1 *Maule & Selwyn*, 297. 1 *Leon.* 262.)

*But, even if it is considered as a voidable lease, the mere acceptance of rent due, unless accompanied by some other act of the lessor, showing his intent to confirm the lease, does not amount to a waiver of the forfeiture. (*Doe, ex dem. Cheney, v. Batten, Coup. Rep.* 243.) It must depend on the *quo animo*, or the intention with which the rent was received.

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Drake, contra. There can be no pretence of maintaining this action under the statute. If it can be supported at all, it must be at common law; and all the niceties required in proceedings by the lessor, must be observed. (*Co. Litt.* 202. a. 1 *Saund.* 287. n. 16.) There must be a *demand* of the precise rent due, on the precise day it was due and payable, at a *convenient time before sunset*, upon the land, and at the dwelling-house, if any there be. Leases for years are void, or voidable, according to the terms of the lease. This is a voidable lease; the terms of it show it to be voidable only. It says, "if the lessor shall elect so to consider it." If a voidable lease, and the conditions have been broken, it may be made good by the acts of the lessor. The alleged breaches are, 1. For the non-payment of rent; but the lessor has not entitled himself to the forfeiture. He ought to have demanded the rent on the premises, and have staid there until dark, or sunset. 2. As to the underletting, it has been settled, that an under lease is no assignment. (2 *Wm. Bl.* 766. 3 *Wils.* 234. *Doug.* 57.) 3. As to the non-payment of the *United States'* tax; the covenant refers to ordinary taxes only, and not to the extraordinary tax laid by Congress. 4. As to the covenant relative to alterations in the buildings; that is not contained in the body of the lease, but is endorsed upon it. It does not come within the clause of re-entry, but is a separate, independent covenant, for which the lessor has his action for damages, in case it has been broken.

CASES IN THE SUPREME COURT

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The court lean strongly against forfeitures of leases, and will examine the conditions strictly, to prevent, if possible, a forfeiture. But, we say, here has been a waiver of the forfeiture, if any existed, by the acceptance of rent, afterwards, *with full notice. (*Jenkins v. Church*, Cowp. 483. *Goodright v. Davids*, Id. 803.)

VAN NESS, J., delivered the opinion of the court. The stipulation in the concluding part of the lease, prohibiting the lessee from making alterations in the buildings, rests in covenant merely, and is not made a condition for the breach of which the estate is forfeited. Nor can the lessor of the plaintiff avoid the lease, because one of the buildings was underlet. The condition in the lease is, that the lessor shall not "assign over, or otherwise part with, this indenture, or the premises thereby leased, or any part thereof, to any person," &c. These words must be construed to mean an assignment of the premises, or part of them, for the whole term; and no forfeiture is incurred by letting for a shorter period; under-leases not being considered as coming within the terms of the condition, or proviso.(a) This principle was fully settled, in the case of *Crusoe, ex dem. Blencowe, v. Bugby*, (3 Wils. 234.) and has been repeatedly sanctioned since, and applied to conditions expressed in stronger terms than in the present case. A lease may be so expressed as to produce a forfeiture for underletting, as well as for assigning the whole term; but this is not the language of the lease in question.

The plaintiff equally fails in showing a right of re-entry, by reason that the defendant did not pay the *United States'* tax, because, the indispensably necessary step of making a demand of the defendant, within the period required by law, in order to create a forfeiture, was not taken.

It remains to be considered, whether the plaintiff is entitled to recover, on the ground that a forfeiture has been incurred by the non-payment of the rent. This is a proceeding at common law, and the claim of the plaintiff being *stricti juris*, all the niceties required by the common law must be previously complied with, to entitle the reversioner to re-enter. There must be a demand of the rent due on the last day, a convenient time before sunset; and, if there be a house on the land, the demand must be made at the house of the tenant, if he is at home. Several other things *are required to be done, which it is not necessary to detail for the purpose of deciding this case. (*Co. Litt.* 201. b. 202. a. 1 *Saund.* 287. n. 16. and the cases there cited.) On the 1st and 20th of November, 1817,

(a) So, where a lessee for lives covenanted not to sell, dispose of, or assign his estate in the demised premises, without the permission of the lessor, &c. It was held that a lease of part of the premises by the lessee for twenty years, was not a breach of the covenant; and that nothing short of an assignment of his whole estate would produce a forfeiture of the lease. *Jackson, ex dem Stevens, v. Silvernail*, 15 Johns. Rep. 278.

Reid, the agent of the lessor of the plaintiff, went to the house of the defendant, (the lessee,) *in the afternoon*, and demanded payment of the quarter's rent then due; but the defendant answered, "he could not pay." A similar demand was made by the agent, on the 1st and 20th of *February*, in the same year, of the quarter's rent then due, and the defendant promised to pay it, but did not. The question is, whether or not, under these circumstances, the right to re-enter accrued. I think it did not. The agent says he made the demand "in the afternoon;" now, this may have been immediately after 12 o'clock, and a demand at so early an hour would not be good. "The last time of demand of the rent," says Lord Coke, "is such a convenient time before the sun-setting of the last day of payment, as the money may be numbered and received." And it is laid down by *Hale*, Ch. B., that the *time of sunset* is the time appointed by law to demand rents; (*Duppa v. Mayo*, 1 *Saund.* 287.) and, though this is probably not literally correct, yet it serves to show that the demand necessary to be made, to create a forfeiture, must be immediately preceding sunset, so that the money may be counted, and the necessary receipt or acquittance given, while there is light enough reasonably to do so. This may appear to be unnecessarily rigorous, and a sacrifice of substance to form; but when it is considered that the consequence of a proceeding of this kind, is the forfeiture of the tenant's whole interest under the lease, every necessary form which the law has prescribed must be most scrupulously observed. "The court have always looked nearly into these conditions, covenants, or provisoes." (*Crusoe v. Bugby*, 3 *Wils.* 234.) It was incumbent on the plaintiff to have shown during what part of the afternoon the demand was made, and that it was towards sunset, or late in the afternoon. The defendant, in a case of this description, had a right to remain passive, and to avail himself of any defect of proof on the other side, necessary to establish his right to recover. This point being decisive, the other objections to the plaintiff's right to recover need not be noticed. The defendant is entitled to judgment. (a)

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Judgment for the defendant.

(a) To entitle the reversioner to re-enter, when there is a condition of re-entry reserved for non-payment of rent; the common law requires that there should be a demand of the rent. The demand must be of the precise rent due. It must be made precisely upon the day when the rent is due and payable, and made a convenient time before sunset. It must be made on the land and at the most notorious place of it; unless a place is appointed where the rent is payable; in which case the demand must be made at such place. And the demand must be made in fact and so averred in pleading, although there should be no person on the land ready to pay it. 1 *Saund.* 287. p. 16. See also *Remsen v. Conklin*, 18 *Johns. Rep.* 450. *Jackson, ex dem. Lewis, v. Schutz*, *Ibid.* 174. *Van Rensselaer v. Andrews*, *Ibid.* 431. As to waiver of the rights of forfeiture, see *Jackson, ex dem. Norton, v. Sheldon*, 5 *Cowen*, 458. *Jackson, ex dem. Blanchard, v. Allen*, 3 *Cowen*, 220.

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BURRILL

v.

CLEEMAN.

The defendant hired the vessel of the plaintiffs, to carry a cargo from *N. Y.* to *P.*, and back with a return cargo to *N. Y.*, and covenanted to pay the plaintiffs for the charter and hire of the vessel "from *N. Y.* to *P.* and back, fourteen hundred dollars, on the delivery of the cargo at *P.*, and the sum of 1,400 dollars, on the delivery of the return cargo, or arrival of the vessel at *N. Y.*" The vessel proceeded with the cargo from *N. Y.* and arrived in sight of *P.*; but the place being strictly block-

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aded by a Portuguese squadron, he was forbidden to enter the port, and having no instructions to proceed to any other port, the master returned to *N. Y.* with the cargo; and the plaintiffs offered the defendant to carry it back to *P.*, or to any port in its vicinity, as the defendant might direct; but the defendant having abandoned the cargo to the underwriters, who accepted it, declined the offer; and the cargo was af-

BURRILL & CAHOON against CLEEMAN.

THIS was an action of *corenant*, in a charter party, made the 10th of *March*, 1817, by which the plaintiffs let to freight, to the defendant, the schooner *Aurora*, "for a voyage from *New-York* to *Pernambuco*." The plaintiffs stipulated to receive a cargo, and (the dangers of the seas and restraints of rulers and princes excepted) to proceed therewith, from the port of *New-York* to *Pernambuco*, and there deliver the said cargo to the defendant, his factors or agents. The defendant was to be allowed 40 running days, for discharging the cargo at *P.* from the time of the vessel's arriving there, and being ready to unload. And the vessel was to leave *P.* within, or at the expiration of, the said 40 days, with the goods, &c. of the defendant on board for *New-York*, there to be delivered, &c. In consideration of the covenant and agreements of the plaintiffs to be performed, he, the defendant, covenanted to pay to the plaintiffs, for the charter and hire of the vessel "from *New-York* to *Pernambuco*, and back, the sum of fourteen hundred dollars on the delivery of the cargo at *P.* and the sum of fourteen hundred dollars on the delivery of the return cargo, or arrival of the vessel, at *New-York*;" and if, by default of the defendant, the vessel should be detained longer than 40 days at *P.*, then the defendant was to pay twenty dollars a day during such detention.

*The declaration contained three counts: the first count averred, that the vessel sailed with the cargo of the defendant on board; for *Pernambuco*, and arrived in sight of, and near the town; but was prevented, by the blockade of the place, from entering and delivering her cargo, and was obliged to return to *New-York*; and did return, and there deliver the cargo to the defendant, and so performed and finished the said voyage, &c., and assigned as a breach the non-payment of the 1,400 dollars, made payable on the delivery of the return cargo, or arrival of the vessel at *New-York*. The second count averred a performance of the voyage generally, and assigned as a breach, the non-payment of the 1,400 dollars on the delivery of the cargo at *P.*, and of the 1,400 dollars on the delivery of the return cargo, or arrival of the vessel at *New-York*.

The third count averred, that the vessel received a cargo of the defendant on board, and was made ready to sail and proceed therewith from the port of *New-York* to *Pernambuco*, and although the plaintiffs were ready and willing to set sail, and proceed with the said cargo from *New-York* to *Pernambuco*,

afterwards demanded and received by the underwriters, who, as well as the defendant, refused to pay the freight. *Held*, that the plaintiffs were not entitled to any freight under the charter party; the voyage having been performed, nor the cargo delivered, according to the conditions of the agreement, on the performance of which the payment of the freight depended.

and there deliver the same to the defendant, and did offer to perform and fulfil, all and singular the covenants on their part to be performed and fulfilled; yet the defendant did not, nor would permit the said vessel to set sail, and proceed with the said cargo to *Pernambuco*, but, afterwards, caused and procured the said cargo to be unladen, and the said vessel to be discharged from the said intended voyage; and hath not paid, or caused to be paid, to the plaintiffs, the charter money, or any part thereof, &c.

It was proved, at the trial, that the defendant, about the 15th of *March*, 1817, shipped on board the vessel, a cargo to be delivered at *P.* with which the vessel, on the 16th of *March*, set sail from *New-York*, on her voyage to *P.*, that, on the 14th of *May* following, she came in sight of the town of *P.*, and close in with four *Portuguese* men of war lying without the bar, and two ships and two brigs; and being brought to by the fleet, the master of the *Aurora* was forbidden to enter the port, which was under strict blockade; *and the *Portuguese* commander endorsed the register of the *Aurora*, warning her not to enter *P.* The master, not having instructions to go to any other port, concluded to return to *New-York*, where he arrived on the 23d of *June* following. The next day, the plaintiffs offered to the defendant to carry the cargo back in the vessel to *P.*, or to any port in the vicinity, as the defendant might direct; the defendant answered, that it would not accord with his views; that he had abandoned the cargo to the underwriters, and had nothing more to do with it. This offer was repeated, before the hatches were opened, and the defendant made the same reply; and the witness understood the offer to be, to carry the cargo back to *P.*, or a near port, under the charter party.

The cargo was insured by the *Ocean Insurance Company*, to whom it was abandoned by the defendant, on the return of the vessel to *New-York*, and the insurers accepted the abandonment. On the 7th of *July*, they demanded and received the cargo, but refused, as did also the defendant, to pay to the plaintiffs any part of the charter money.

It appeared that the blockade of *P.* was raised, and the *Portuguese* authority re-established there, on the 23d of *May*, 1817.

A verdict was taken for the plaintiffs, for 3,200 dollars, subject to the opinion of the court, whether, under the circumstances of the case, the plaintiffs were entitled to recover, under any, and which, count of the declaration, and to what amount, if any, they are entitled, and to award a *venire de novo*, or writ of inquiry, to assess the damages; but if the court should be of opinion that the plaintiffs were not entitled to recover on any of the counts, then a judgment was to be entered for the defendant.

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M^r Coun, for the plaintiffs. By the true construction of the charter party, the plaintiffs are entitled to recover at least 1,400 dollars, under the first count in the declaration. This case is distinguishable from those of *Scott v. Libby* and others. (2 *Johns. Rep.* 336.) and *Penoyer v. Hallet*, (15 *Johns. Rep.* 332.) decided in this court, where the voyage was entire, out and home, and the performance of the *entire voyage* was a condition precedent to the payment *of freight. Here the contract shows, clearly, two distinct voyages, one out to *Pernambuco*, and the other back to *New-York*. The vessel could not enter *Pernambuco*, and she returned to *New-York*, and there delivered her cargo. The claim of the plaintiffs to one half, at least, of the freight, is equitable and just. Wherever the voyage can be divided, so as to give the plaintiff a just compensation, the court will do it. In the present case, the freight may be easily apportioned. The charter party itself divides it into two parts; as for two distinct voyages, out and home. Lord *Ellenborough*, in *Ritchie v. Atkinson*, (10 *East*, 295. 298.) speaking of the case of *Smith v. Wilson*, (8 *East*, 437.) says, "where the freight is made payable on an indivisible condition, such as in that case, the arrival of the ship with her cargo at her destined port of discharge, such arrival, &c. must be a condition precedent, because it is incapable of being apportioned, but here the delivery of the cargo is, in its nature, divisible, and, therefore, I think it is not a condition precedent; but the plaintiff is entitled to freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery." The principle laid down in that case is applicable to the present. In *Liddard v. Lopes*, (10 *East*, 526.) the court said that the plaintiff could not recover; but should have provided in his contract for the emergency which had arisen. Here the contract provides for the case of a return of the vessel to *New-York*; and having returned with the cargo, the plaintiff is fairly entitled to the freight of the return voyage. In construing a covenant, it is to be taken most strongly against the covenantor. The fair construction is, that the plaintiff is to be paid the 1,400 dollars, on the return of the vessel to *New-York*, though she should not be able to obtain a return cargo at *P.* (*Bell v. Puller*, 2 *Taunt.* 295.) In *Brown v. Hunt*, (11 *Mass. Rep.* 45.) the contract was for a voyage from *Boston* to *Savannah*, from thence to a port in the *West Indies*, and from thence to *Boston*, with liberty to return from the *West Indies* to any port in the *United States*, and thence to *Boston*, and the defendants were to pay a certain sum per ton, *per month*, as long as *the vessel continued in the service, *in thirty days after her return to Boston*. The vessel performed the voyage from *Boston* to *Savannah*, thence to the *West Indies*, and back to *Savannah*; and, while proceeding home from *Savannah* to *Boston*, was captured by the Brit-

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ish, and burned. The Supreme Court of *Massachusetts* held the different passages to be distinct voyages, and the plaintiff received freight up to the time of the last delivery of a cargo, at *Savannah*, previous to the sailing thence for *Boston*.

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Again; the plaintiffs had a right to carry the goods to *P.* after the blockade was removed, and they offered to do so; but the defendant refused his consent. The plaintiffs are not to be affected by any arrangements between the defendant and the insurers of the cargo.

T. A. Emmet, contra. 1. The charter party was dissolved by the blockade of *P.*, the port of delivery, and no action at law can be maintained on it. In *Scott v. Libby* and others, (2 *Johns. Rep.* 336.) the court say, that the charter party is dissolved by the blockade of the port of destination; and that trover would lie for the cargo, which the defendant refused to deliver, unless the freight was paid.

The voyage, in this case, was entire, from *New-York* to *P.* and back. The freight was to be paid in two installments; but the contract is single and entire.

2. Admitting, however, that there were two distinct voyages; yet, the performance of the voyage to *P.* was a condition precedent to the payment of any part of the freight. The vessel never did arrive at *P.*, nor did she deliver a cargo there. The second voyage was to bring a return cargo from *P.* to *New-York*. But the vessel never was at *P.*, and so could not bring a return cargo from thence to *New-York*. So that, whether the whole is considered as one entire voyage, or as divisible, the plaintiffs have not performed their contract. There can be no doubt as to the blockade. (*The Tutela*, 6 *Rob. Adm. Rep.* 177.) The plaintiffs might have had their freight insured, and would, on account of the blockade, have recovered the amount from the underwriters. (*Schmidt v. N. Y. Ins. Co.* 1 *Johns. Rep.* 249.)

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The contract of charter party is to be considered fairly, according to the true intent and meaning of the parties. What benefit has the defendant derived from the contract? On what principle of equity is he bound to compensate the plaintiffs for their loss, arising from an unforeseen event, or accident?

3. As to the claim to a recovery, under the third count, on the offer to carry the cargo to *P.*, the case of *Smith v. Wilson*, (8 *East*, 437.) shows, most clearly and decidedly, that it is unfounded. The offer to do a thing which it is not in the immediate power of the party to do, but the performance of which may be defeated by various contingent events, or inevitable accidents, is not enough to entitle him to recover, from the other party, for the non-performance of a corresponding duty, on the ground of his refusal to accept the offer.

If the defendants had a right to wait for the removal of the

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blockade of *P.*, and to go there afterwards, and so earn his freight, by delivering the cargo, the consent of the defendant was not necessary. They might have insisted on their right to carry on the cargo to *P.*, or to be paid their full freight. (*Griswolds v. New-York Ins. Co.* 1 *Johns. Rep.* 205. *S. C.* 3 *Johns. Rep.* 321.)

As to any compensation for bringing back the defendant's goods to *New-York*, arising from an implied *assumpsit*, it should be made against the insurers who received the cargo; not against the defendant.

Ely, in reply. The blockade of the port of destination does not dissolve the contract of charter party. In *Scott v. Libby, Thompson, J.*, says, "It appears to be conceded by the counsel on both sides, that, by the blockade of the port of discharge, the charter party was dissolved, and all claim to freight under it gone;" and he refers to *Abbot*, p. 338; and the same judge, afterwards, in *Lorillard v. Palmer*, (15 *Johns. Rep.* 14—20,) refers to *Scott v. Libby*, for this doctrine, as settled. *Abbot* does not lay down such a principle; and the cause of *Lorillard v. Palmer* has been reversed *in the Court of Errors. (a) A blockade is different from an interdiction of commerce; it is considered only as a temporary interruption of the voyage; and the master may wait until the port be opened, without prejudice to the policy of insurance. (*Per Parsons*, Ch. J., 6 *Mass. Rep.* 118. *Richardson v. Mar. Ins. Co.* 60.) It is in the election of the master, to consider a blockade as putting an end to the charter party, or not. He may, if he chooses, go to a near port, and wait until the blockade is removed. If the performance of a contract is obstructed, without any fault of the person who is to perform, he may wait a reasonable time for the removal of the obstruction, and then perform it. He may offer to proceed with the cargo, as the plaintiffs did, in this case, and if the other side refuses, he must pay freight. (3 *Johns. Rep.* 322.) The case of *Smith v. Wilson*, turned on the pleadings, and the strict construction of the covenant, as to the breach assigned in the declaration.

But the plaintiffs do not merely claim freight, *eo nomine*,

(a) Vide 16 *Johns. Rep.* 348. This was a case of a blockade of the port of departure; but *KENT*, Chancellor, refers to the case of *Scott v. Libby* for the doctrine, that "if there be a blockade of the port of destination, so that a delivery becomes impossible, and the vessel returns with her cargo to the port of departure, the voyage is defeated, and the freight not earned." *Abbot*, (part 3. ch. 11. s. 3.) after stating, that, if the performance of the agreement became unlawful, it is absolutely dissolved, as when, before the commencement of the voyage, hostilities take place between the country to which the vessel and cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, says, "but if war or hostilities break out between the place to which the ship or cargo belongs, and any other nation to which they are not destined; although the performance of the contract is thereby rendered more hazardous, yet is not the contract itself dissolved; and each of the parties must submit to the extraordinary event, unless they mutually agree to abandon the adventure (*Ordonnance de la Marine*, Valin. liv. 3. tit. 3. fret. art. 15.)

under the contract; but they demand damages for refusing to let them proceed and fulfil the contract, according to the charter party. There was no near port to *P.*, to which the plaintiffs could go, for a market.

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*VAN NESS, J., delivered the opinion of the court. Whether here were not two distinct voyages, one out, and the other home, or not, is a question not necessary to be decided. The terms of this charter party are a little peculiar, and I am not prepared to say, that if the cargo had been delivered at *Pernambuco*, that the outward freight would not have been earned, in case the vessel had never arrived at *New-York*. But the cargo has not been delivered there, and the outward freight, therefore, admitting the voyage to be divisible, has not been earned. The stipulation, however, that the freight, payable on delivery of the return cargo, or arrival of the vessel at *New-York*, has been supposed, under the facts in this case, to give the plaintiff a right to recover the freight home. This is not the true construction of the contract, which clearly contemplates, that the freight home shall be payable only, in case the voyage out shall have been performed. The freight back is payable on the voyage from the port of destination, and after her arrival and delivery of the outward cargo there. The parties, probably, had in view the contingency, that no return cargo might be obtained, and for that reason the payment of the 1,400 dollars at *New-York* was made to depend upon the happening of one of two events, viz. the delivery of a cargo to be shipped, at *Pernambuco*, if one should be procured, and if no such cargo was shipped, then on the arrival of the vessel at *New-York*. The freight, stipulated to be paid by the charter party, depended upon the performance of the voyage, and was a condition precedent to the freight being payable, and this condition not having been performed, the freight cannot be recovered.

With respect to the right to recover damages on the third count, the case of *Smith v. Wilson*, (8 *East*, 443.) is in point. The defendant had a right to abandon the cargo on its arrival at *New-York*, and the charter was made with reference to that right. The defendant has lost the expected profit of the voyage, and the plaintiffs have lost their freight, by one of those contingencies to which all commercial adventures are subject.

Judgment for the defendant.

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HALSTED

v.

SCHMELZEL.

*H. & S. made a joint purchase of a quantity of goods, each paying the one half of the price. They sold to A. one package of the goods, on a credit of five months; and afterwards divided the remainder of the goods between them, and H. paid S. for one half of the price of the package sold. A., having become insolvent, H. brought an action of *assumpsit* against S. to recover the one half of the loss arising on the sale. It was held, that this was a co-partnership concern, and that an action at law could not, therefore, be maintained by the plaintiff, without proving an express promise to pay. That even if an action could lie in such a case, yet, as H. had taken the* [* 81] *note of A., and treated it as his own, extending the time of credit and changing the security, without the consent of S., and finally making a compromise of the claim, he had no right to call on S. to share in the loss.*

*HALSTED & WIGGINS against SCHMELZEL.

THIS was an action of *assumpsit*, tried the 8th of *December*, 1818, at the *New-York* Sittings, before the late chief justice.

In *October*, 1815, the plaintiffs and defendant made a joint purchase, from *Caines & Crary*, of a quantity of French goods, to the amount of 18,608 dollars 33 cents, and the plaintiffs gave their notes for one half the amount, and the defendant gave his note for the other half. On the 15th of *October*, 1818; *Seymour & St. John* purchased from the plaintiffs and defendant, one case of goods, for 2,583 dollars and 84 cents, at a credit of five months; and, before the expiration of the time, the plaintiffs agreed to receive in payment the notes of *St. John & Warner*, which they accordingly received, the firm of *Seymour & St. John* having become insolvent; and, on receiving these notes, the credit was extended to six months. When the notes became due, the plaintiffs took, in lieu of them, *Smith & Spicer's* notes, endorsed by *Seymour & St. John*, at six months, *St. John & Warner* having failed, at which last-mentioned transaction the defendant was not present. The witness stated that, although *Seymour & St. John* failed, and declared themselves insolvent, yet *Seymour* had been, and still was, able to pay all his debts.

On the 25th of *November*, 1815, the plaintiffs and defendant made a division of the goods purchased by them and remaining on hand, and for the part sold, the plaintiffs gave to the defendant their two several promissory notes, of 542 dollars and 44 cents each, for the one half, payable in *March*, 1816, and which were, afterwards, paid by the plaintiffs to the assignees of the defendant, who had become insolvent.

On the 31st of *July*, 1817, the plaintiffs addressed a letter to the defendant, as follows: "Dear Sir—*Seymour & St. John* have made a proposition to settle our joint claim on them, of 2,583 dollars and 87 cents, (equal to about 8 *shillings in the pound,) for one case of *French* goods. We believe it to be an advantageous offer; and, unless you object to it this day, we shall accept it, and hold you accountable for half the loss."

In the afternoon of the day on which the letter was dated, the plaintiffs compromised with *Seymour & St. John*, and *Smith & Spicer*, who paid about 1,100 dollars, on their notes; (and, to recover the one half of the loss, this action was brought.) The witness stated, that he did not know that *Smith* was insolvent; that he is now cashier of a bank at *St. Louis*, (*Missouri*;) and that *Seymour* had always been able to pay his debts. Another witness stated that *Smith* was, at the time of this compromise, notoriously insolvent, and that all the parties to the notes were then believed to be so, and that he advised the compromise, as advantageous to the plaintiffs.

The plaintiffs having rested their cause, the defendant's counsel moved for a nonsuit, on the ground that this was a co-partnership transaction; and, therefore, no action at law could be maintained, without proof of an express promise by the defendant. The chief justice reserved the question.

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A witness for the defendant testified, that, in a conversation with the plaintiffs, on the subject of this controversy, he asked them, whether the defendant, after the division of the goods, could have enforced payment from *Seymour & St. John*, or *Smith & Spicer*, and the plaintiffs replied "no; the defendant had nothing to do with it."

The chief justice charged the jury, that it did not appear that the defendant had any agency in exchanging the security of *Seymour & St. John* for that of *St. John & Warner*, nor in extending the terms of credit when the notes of *Smith & Spicer* were taken, nor in the change of security at that time; that the notice of compromise to the defendant was very short, to say the least of it; that, as to the compromise itself, its prudence and necessity were doubtful; and he thought, upon the whole, that the evidence was not enough to charge the defendant; but that these were questions of fact for the consideration of the jury. The jury found a verdict for the plaintiffs, for 965 dollars and 76 cents.

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A motion was made to set aside the verdict, and for a new trial, as well on the point reserved, as because the verdict was against law and evidence.

D. B. Ogden, for the plaintiffs. This action is for the half of a loss, in the nature of a liquidated balance; the joint concern in which the particular purchase of goods was made, and to which the partnership was restricted, having spent itself before the loss occurred. The adjustment made by the parties was a final settlement of the co-partnership. It is true, that the courts, in *England* and here, have said, that an action at law cannot be maintained by one partner against another, unless there has been a settlement of accounts, and an express promise by one partner to pay the balance. (*Murray v. Bogert*, 14 *Johns. Rep.* 318.) But in *Rackstraw v. Imber*, GIBBS, Ch. J., (1 *Holt's N. P. Rep.* 368.) held, that an express promise was not necessary; that the "dissolution of the pre-existing co-partnership, and the mutual settlement of an account, are a sufficient consideration in law for an implied promise to pay a balance on the side of the partner from whom such balance is due." And this court, in *Wetmore v. Barker*, (9 *Johns. Rep.* 307.) went on the ground, that the law would raise an implied promise to pay the balance found due on the settlement of accounts between partners. The error into which the *English* courts and this court seem to have fallen, in supposing that an express promise was necessary, originated in the case of *Foster v. Allanson*, (2 *Term Rep.* 479. and see *Moravia v. Levy*, n.

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483.) in which there were articles of co-partnership, for seven years, and a *covenant* to settle accounts annually. Here the joint or partnership concern, between the plaintiffs and defendant, was finally and for ever closed. In *Bond v. Hays*, (12 *Mass. Rep.* 34.) the Supreme Court of *Massachusetts* held, that *assumpsit* would lie by one partner against his co-partner, for money paid by him, on a dissolution and adjustment of the concern, more than was actually due. Now, have not the plaintiffs paid to the defendant more than he was entitled to? The plaintiffs gave their notes to *the defendant, for the one half of the amount of the goods sold *St. John & Warren*, the consideration for which was, that the note of *St. John & Warren*, taken on the sale to them, would be paid; and that consideration having failed, the plaintiffs are entitled to recover back the money they have paid in this action.

Suppose the plaintiffs had received the whole money, at the time, from *St. John & Warren*, could not the defendant have maintained an action of *assumpsit*, to recover of the plaintiffs the one half, as so much received to his use?

There are no partnership accounts in this case to be adjusted; there is nothing which can deprive this court of its jurisdiction, or which renders it proper, or necessary, to send the plaintiffs to a court of chancery.

There can be no pretence, that the plaintiffs have made the debt their own, by changing the notes. They acted in good faith, and gave notice to the defendant before they took any step.

Anthon, contra. The question is not, whether there was a partnership between these parties, but whether one can maintain an action against the other, for a share of a loss sustained on a joint sale, without an express promise to pay. Whatever fluctuation there might have been in the *English* courts, as to this question, this court have uniformly decided, that an action cannot be maintained by one partner against another, on a settlement of accounts, unless there has been an *express* promise to pay the balance. (*Casey v. Brush*, 2 *Caines's Rep.* 294. *Nevin v. Spickeman*, 12 *Johns. Rep.* 401. *Murray v. Bogert*, 14 *Johns. Rep.* 321. 1 *Binney's Rep.* 192. S. P. 2 *Term Rep.* 483. n. *Watson on Partnership*, 396. 2d ed.) The application of this rule to a general partnership cannot be doubted; and the reason of the rule applies equally to a *special* partnership, as in this case.

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Again; the plaintiffs took the whole debt of *St. John & Warren* to themselves. They treated it as their own. They changed the security, and made a compromise; and though the defendant had notice of the proposed compromise, yet *it was short, unreasonable, and insufficient. He never assented to any acts of the plaintiffs. One of the debtors, *Seymour*, was proved to be perfectly solvent. The compromise was, therefore, un-

necessary and imprudent, and discovered a great want of care and attention, on the part of the plaintiffs.

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Per Curiam. The objection that this demand arises out of a partnership concern is conclusive. There has not been a liquidation of the demand, and, certainly, nothing like an express promise to pay it. The merits, also, of this case, are with the defendant. The compromise made by the plaintiffs was unjustifiable. The weight of evidence is clear, that *Seymour* was always able to pay the debt. The plaintiffs received the debt as their own, and have treated it as such, and have acted in such a manner as to take away all right to throw any part of the loss on the defendant. There must be a new trial, with costs to abide the event.

New trial granted. (a) (b)

(a) Vide *Robson v. Curtis*, (1 *Starkie's N. P. Rep.* 78.) *A.* received a bill of exchange in payment for cattle, jointly purchased by himself and *B.*, and sold to *C.*, which he endorsed to *B.*, and being dishonored, *B.* promised *A.* that if he would take up the bill, he, *B.*, would pay *A.* half the amount. In an action of *assumpsit*, brought by *A.* on this promise, Lord *Ellenborough* said, that if there had been partnership dealings, and only one *item* remained unadjusted, the difficulty as to partnership would disappear; but that not being the case, as some of the cattle remained unsold, after the sale to *C.*, and it did not appear that the account had been settled, he nonsuited the plaintiff. In *Venning v. Leekie*, (13 *East*, 7.) where the plaintiff and defendant agreed to be jointly concerned in the purchase of a quantity of flax, and to share in the profit and loss, and the defendant promised to furnish one half the amount, in time, for the payment; it was held, that *assumpsit* would lie against the defendant for his share of the purchase money.

(b) See *Musier v. Trumbour*, 5 *Wendell's Rep.* 274. The rule that an action of *assumpsit* will not lie by one partner against another for moneys paid in the partnership concern, is as applicable to a law partnership of practising attorneys as to other partnerships. *Westerlo v. Evertson*, 1 *Wendell's Rep.* 532. *Smith v. Allen*, 18 *Johns. Rep.* 245. It seems by the case last cited, that, after a trial decided for the plaintiff, it is too late for the defendant to object, that the subject matter of the suit was a copartnership contract between him and the plaintiff. The objection ought to be made at the trial.

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THE defendant obtained his discharge as an insolvent debtor, on the 8th of *January*, 1812, under the insolvent act of the 3d of *April*, 1811. The agent and attorney of the plaintiff appeared before the judge, in behalf of the plaintiff, a judgment creditor, to oppose the defendant's discharge; and after examining the insolvent, became satisfied, as the affidavit on the part of the defendant stated, with the explanations of the defendant, relinquished all opposition, and consented to his dis-

Where the plaintiff appeared before the judge to oppose the defendant's discharge under the insolvent act of the 3d of *April*, 1811, and after examining the defendant, and hearing his ex-

planations, withdrew, without making any further opposition, and the defendant obtained his discharge; the court, on motion, ordered a perpetual stay of execution on the part of the plaintiff; and if the defendant had applied immediately after his discharge, a *discontinuance* would have been ordered, under the circumstances of the case.

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charge, which was thereupon granted by the judge. No proceedings were, afterwards, had on the part of the plaintiff, until since the last term, when an execution was taken out against the defendant. The affidavit of the plaintiff's agent stated, that he did not expressly, or tacitly, consent to the defendant's discharge; but, finding opposition fruitless, under the act, he withdrew.

A motion was now made to set aside the execution, and for a perpetual stay of execution on the judgment.

Brinckerhoff, for the defendant.

C. W. Graham, for the plaintiff.

Per Curiam. The conduct of the plaintiff's attorney is equivalent to an abandonment of his suit; and if the defendant had applied, after obtaining a regular discharge under the act, for a discontinuance, we should have ordered a rule for that purpose, to be entered. We think, under these circumstances, that the motion ought to be granted.

Motion granted.

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**LEE against CURTISS.*

The record in which a judgment was entered for the defendant, on a plea of *non est factum*, accompanied with notice of special matter to be given in evidence at the trial, was amended by striking out the judgment, and entering a judgment of nonsuit, so as to accord with the truth of the case.

THIS was an action of covenant, on a covenant of warranty in a deed, to which the defendant pleaded *non est factum*, with notice, pursuant to the statute, of special matter, &c. to be given in evidence. At the trial, the deed was proved, and a verdict was taken, subject to the opinion of the court, on the question of eviction. The judgment of the court being in favor of the defendant, it was entered upon the record generally, for him, according to the issue of *non est factum*.

N. Williams, for the plaintiff, now moved to amend the judgment record, by striking out the verdict and judgment, and entering, in their stead, a verdict, that the deed declared on was the deed of the defendant, but that the plaintiff, not having proved an eviction, could not recover. He stated that the plaintiff would, in the present state of the record, be barred from bringing any other action on the same deed.

SPENCER, Ch. J. The difficulty has arisen from the act (1 N. R. L. 515. sess. 36. ch. 55. s. 1. 2 Rev. Stat. 352 § 10.) for the amendment of the law, &c., allowing the defendant to plead the general issue, and to give notice of any special matter to be offered in evidence. If the notice had been entered on the record with the plea, the true point in controversy would then

have appeared. The record ought to be amended according to the truth of the case, so as to do justice between the parties.

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Collier, for the defendant, suggested that the amendment might be made, by directing a nonsuit to be entered, to which *Williams* assented.

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Per Curiam. Let the record be amended by striking out the verdict and judgment, and entering, in their stead, a judgment of nonsuit.

Rule accordingly.

*In the Matter of the AGRICULTURAL SOCIETY of the contiguous counties of DUTCHESS and COLUMBIA against A. M'INTYRE, Comptroller, &c.

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BY an act passed the 7th of *April*, 1819, (sess. 42. ch. 107.) the legislature appropriated the sum of *ten thousand* dollars, for two years, for the promotion of agriculture and family domestic manufactures, to be distributed among the several counties. Of this sum 400 dollars were given to the county of *Dutchess*, and 300 dollars to the county of *Columbia*. The second section of the act declared that, whenever any agricultural society should be formed in any one county, or in two contiguous counties, the members of which should annually procure or raise, by voluntary subscription, a sum of money, and file affidavit thereof with the comptroller; he should issue his warrant on the treasurer for the payment of a sum, equal to the amount of such voluntary subscription; but not exceeding the amount to which the county or counties were entitled by the apportionment made in the first section of the act.

Where *Agricultural Societies* in the counties are to be instituted, in order to entitle themselves to the sums appropriated by the act, passed the 7th of *April*, 1819, (sess. 42. ch. 107.) for the promotion of agriculture, &c. they should be formed after due public notice to all the inhabitants of the county, to meet for that purpose.

Several of the inhabitants and farmers of the counties of *Dutchess* and *Columbia*, who had, in 1814, formed an agricultural association, called *The Farmers' Club*, and had annually distributed premiums to promote agriculture, met on the 10th of *May*, 1819, at *Red Hook*, in *Dutchess* county, pursuant to notice, and formed themselves into a society, under the name of "*The Agricultural Society of the contiguous counties of Columbia and Dutchess.*" Having organized the society, and received the funds of the former association, a subscription was opened and circulated, and a meeting of the officers of the society appointed for the 21st of *May*, at which time the sum of 712 dollars and 70 cents was raised by voluntary subscription, including the funds of the same association. A certificate and affidavit as to the amount was, accordingly, transmitted to the comptroller, with a request, that he would issue his warrant to pay them the amount appropriated, by the act, to the said two

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counties, *which the comptroller declined doing, supposing that the moneys were to be paid to separate societies in the two counties.

Talcot now moved for a *mandamus* to be directed to the comptroller, commanding him to pay over to the said society, the sums of money appropriated to the said counties, pursuant to the said act.

Oakley, (attorney general,) contra. He read several affidavits, from which it appeared, that about the 15th of *April* last, the grand jurors, at a court of oyer and terminer held at *Poughkeepsie*, in *Dutchess* county, after consulting with several gentlemen of the county, then present, proposed to give public notice of a meeting of the inhabitants of *Dutchess* county, to take into consideration the propriety of forming a *Dutchess* county agricultural society. A notice, signed by the foreman and the other jurors, was, accordingly, inserted in the *Poughkeepsie Journal* of the 21st of *April*, 1819, and in one or more county papers, of a meeting to be held, on the first *Tuesday* of *June*, 1819, at *Luther Gay's* in the town of *Washington*, which, from its central situation, was the usual place of holding county meetings, for the purpose of forming an agricultural society in the county, to which all the inhabitants of the county were invited, and which notice was published in the same *Journal*, for several successive weeks. On the first *Tuesday* of *June*, not more than 25 persons attended, on account of bad weather; and they unanimously resolved to adjourn the meeting until the 22d day of *June*, on which day there was a very numerous meeting of the citizens of the county at the same place; previous to which, an address to the farmers of the county, calling their attention to the adjourned meeting, was published. At this meeting, by a unanimous resolution of the persons present, a *Dutchess county Agricultural Society* was formed, officers appointed, and the society organized, in such a manner as fully to comply with the terms of the act, and entitle the society to the sum appropriated by the legislature.

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Per Curiam. The reasonable construction of the act, though no precise directions are given for the purpose, is, *that these societies should be formed after due *public notice* given to *all* the inhabitants of the county. The notice given for the formation of a society for the two counties, was a private notice sent to the members of the *Farmers' Club*; it was not sufficiently general and public. The counties of *Dutchess* and *Columbia* are large; and the provision in the act was evidently intended for small counties contiguous to each other. We think, therefore, that this motion ought not to be granted.

Motion denied.

The Overseers of the Poor of the Town of VERNON
against The Overseers of the Poor of The Town
of SMITHVILLE.

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IN ERROR, on *certiorari* to the Court of General Sessions of the Peace of the county of *Chenango*.

On the 9th of *November*, 1816, two justices of *Smithville*, in the county of *Chenango*, made an order for the removal of *William Chittenden*, a pauper, of the age of eleven years and five months, from *Smithville* to *Vernon*, and adjudged that his legal settlement was in *Vernon*. (a) There was an appeal from this order to the Court of General Sessions of the Peace of the county of *Chenango*, which affirmed the order. At the hearing, the appellants excepted to the order, 1. Because the justices had not adjudicated that the last legal settlement of the pauper was in *Vernon*; and 2. Because it did not appear, by the order, that the pauper was ordered or directed to remove to his former place of settlement, before the justices issued their warrant for removal.

*It appeared in evidence, that about twelve years ago, *Truman Chittenden*, and *Lois*, his wife, came to *Vernon*, and remained there a few months, were warned out of the town, and departed, not having gained a settlement in that town. During their residence in *Vernon*, *W. Chittenden*, the pauper, was born. In 1800, and the two succeeding years, *T. Chittenden* resided in *Lisle*, in the county of *Broome*. *Seymour*, who was collector of *Lisle*, in 1801, testified, that he could not positively say whether he collected a tax of *T. Chittenden*, but he thought it likely that he did. *Lois Chittenden*, the mother of the pauper, testified that her husband paid one year a tax of six shillings, and she thought that he paid it to *Seymour*. *Beach*, who was collector in 1802, testified, that *T. Chittenden* was on his tax list; that he went to his house for the tax, and believed that he received it, though he did not recollect clearly, but he knew that he paid over the full amount of his tax bill to the treasurer.

About 1813, *Lois Chittenden*, with her family, of which the pauper was one, was removed from the town of *Cincinnatus* to the town of *Lisle*, by an order of two justices. The overseers of the poor of *Lisle* appealed from that order, and gave notice of the appeal to the overseers of *Cincinnatus*, who, thereupon, sent for her and her family, and brought them back to *Cincinnatus*. In consequence of this, the appeal was not prosecuted, nor the order reversed. It also appeared that, previous to making the order of removal by the justices of

An adjudication, in an order of removal, that the pauper's legal settlement was in A. is tantamount to an adjudication that his last legal settlement was there, and the order is sufficient.

Where a pauper has actually become chargeable to the town, there is no necessity to order him to remove to his last legal settlement, previously to issuing a warrant for his removal.

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The place of birth of an infant pauper is, *prima facie*, his place of settlement, but it may be removed to the last legal settlement of the parents, when discovered.

Where an order is made for the removal of a pauper from A. to B., from which order the overseers of B. appeal, but the overseers of A. take back the pauper, and the appeal is, consequently, never prosecuted, the order, although unreversed, is not evidence that the pauper's settlement was in B.

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Smithville, L. Chittenden and her family, including the pauper, had been warned to depart.

The case, on the return to the *certiorari*, with the exceptions taken, was submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court. I will first consider the exceptions taken by the appellants to the form of the order. The justices "adjudge that the legal settlement of the pauper is in *Vernon*." This is sufficient; legal settlement, and last legal settlement, are the same thing, because, by every new settlement, the preceding one is discharged. (2 *Salk*. 473.)

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The second exception is not tenable; for whatever might be the construction given to the statute, in a case where it *is stated that the pauper was likely to become a charge, there is no ground for the objection, when it is alleged, that the pauper *had actually become chargeable*; in this latter case, the justices need not order the pauper to remove to his former settlement previous to issuing a warrant; for the statute only requires such previous order in cases where the pauper is likely to become a charge, not where he is actually chargeable.

The pauper was born in *Vernon*, which is, *prima facie*, his place of settlement, and remains so until the settlement to which he is entitled, by parentage, is discovered, (14 *Johns. Rep.* 334. *Delavergne v. Noxon*.)

The settlement of a child is where the father was last settled; if the father has none, the child must go to its mother's settlement. It is not pretended that the father or the mother of the pauper ever gained a settlement in *Vernon*; yet that town is chargeable, by reason of the birth of the pauper, unless it can be shown, that the parents gained a settlement elsewhere. This has been attempted in two ways; the appellants contend, that the order of removal made by the justices of *Cincinnati* has not been reversed, and that this is conclusive, that the pauper was settled in the town of *Lisle*. It will be admitted, that an order not appealed from, is conclusive as to the place of settlement; but that is not this case; an appeal was made by the town of *Lisle*, and notice given thereof. The overseers of *Cincinnati* sent to *Lisle*, and brought back the pauper, preferring that course to a trial on the question of settlement; for this cause the appeal was not further prosecuted. The order made by the justices of *Cincinnati* must be considered as abandoned, and at an end, and that by the consent of both parties. It was the same as if it never had existed, and, consequently, *Lisle* was not concluded by it. The case of *The King v. The Inhabitants of Lanchydd* (*Burrow's Settlement Cases*, 658.) is in point.

It is, lastly, contended, that *Truman Chittenden*, the father of the pauper, paid taxes for two years in the town of *Lisle*, by which he gained a settlement; the testimony on this point

is satisfactory as to the payment of taxes for one year, but doubtful and uncertain as to the other. A settlement *by payment of taxes, is gained by being charged with, and paying such taxes. (14 *Johns. Rep.* 88.)

Ira Seymour, the collector, has no distinct recollection that *Truman Chittenden* ever paid a tax to him, although he thinks it likely: he has no knowledge that he was charged with the payment. *Lois Chittenden* recollects that her husband paid a tax of six shillings one year, and thinks it was to *Ira Seymour*; but whether her husband had ever been assessed, or whether the six shillings paid, if paid to *Seymour*, was a part of the public taxes of the town, we are left to conjecture. It would be manifestly unjust, from such uncertain testimony, to draw the conclusion, that *Truman Chittenden* ever gained a settlement in the town of *Lisle*.

The order of Sessions must, therefore, be affirmed.

Order of Sessions affirmed.

PANTON *against* HOLLAND.

THIS was an action on the case. The declaration stated, that the plaintiff was lawfully possessed of a certain messuage, or dwelling-house, in the city of *New-York*; yet that the defendant, well knowing the premises, but contriving, and maliciously intending, to injure and aggrieve the plaintiff, and to deprive him of the use, benefit, and advantage of his said messuage, dug up the soil and earth of a certain lot of ground contiguous, and adjoining to the plaintiff's messuage, close to the said messuage, and threw and carried away the soil and earth coming thereout, in so much, that by the digging, throwing, and carrying away, the earth and soil thereout coming, the foundation walls of the plaintiff's messuage, and a great part of the plaintiff's messuage, then and there foundered and fell down, and the residue was greatly broken, *shattered, and spoiled. The defendant pleaded not guilty. The cause was tried before the late chief justice, at the *New-York* sittings, in *November*, 1818.

The plaintiff was the owner of a house and lot in *Warren street*, in the city of *New-York*, and the defendant, in erecting a house on a lot contiguous to the plaintiff's, in order to lay the foundation, dug some distance below the foundation of the plaintiff's house, in consequence of which, one of the corners of the plaintiff's house settled, the walls were cracked, and the house, in other respects, injured. Evidence was produced,

Where the plaintiff, in a special action on the case, declares that the defendant, contriving, and maliciously intending, to injure and aggrieve the plaintiff, dug up the soil of a contiguous lot, whereby the foundation walls of the plaintiff's house were injured, evidence of negligence on

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the part of the defendant, will support the declaration; the allegation of malice being immaterial; as it may be struck out as surplusage, and there still be left a good cause of action.

A person on building a house

contiguous, and adjoining to the house of another, may lawfully sink the foundation of his house below the foundation of his neighbor, and is not liable for any consequential damage, provided he has used due care and diligence to prevent any injury to the house of the other.

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on the part of the plaintiff, to show a want of proper care and skill in the persons employed by the defendant to lay his foundation. When the plaintiff had rested his cause, the defendant's counsel moved for a nonsuit, on the ground that the declaration being for the malseasance, and not the misfeasance of the defendant, the question of negligence, or unskillfulness, could not arise; and that, inasmuch as it appeared from the plaintiff's own showing, that the defendant had dug on his own land, for the purpose of erecting a house, which was an act lawful in itself, the right to recover was not made out. The motion, however, was refused. A number of witnesses were then produced on the part of the defendant, to prove that a due degree of care and diligence had been employed in laying his foundation, for the purpose of preventing any damage to the plaintiff's house.

The chief justice charged the jury, that there was no doubt but that the defendant, in building his house, had occasioned a damage to the plaintiff's, and the only question for them to decide, was the amount of the damage; that, in his opinion, they ought to give the difference in value between what the house would have sold for before, and after, the injury, and not merely the expense of repairs, as the injury was permanent, and could not be effectually repaired; that the plaintiff had first built his house, and, as the testimony showed, had built a good house, with a good foundation, and if the defendant, in building his house, thought proper to sink his foundation below that of the plaintiff, he must take care, in so doing, not to injure the plaintiff's house, otherwise he would be liable for any damage; and that there *was good reason to conclude, from the evidence, that the defendant was guilty of negligence in not taking all the precautions which might have been taken, to prevent the injury. The jury found a verdict for the plaintiff, for 1,200 dollars damages.

A motion was made to set aside the verdict, and for a new trial.

M' Coun, for the defendant. 1. The evidence did not support the declaration, which is not founded on negligence or misfeasance, but a malseasance. The plaintiff avers, that the defendant *maliciously* dug up the soil, &c. The plaintiff was bound to prove express malice, or that the act was unlawful, from which malice might be inferred. The evidence shows only, that a lawful act has been done, which, in its consequences, has produced damage to the plaintiff. (*Hullman v. Bennett*, 5 *Esp. N. P. Cases*, 226. 6 *Term Rep.* 411. 7 *East*, 368. 2 *H. Bl.* 267. 299. 3 *Wils.* 461.)

2. But we contend, that the defendant is not liable at all, for the injury alleged to be sustained by the plaintiff. The defendant had a right to lay such a foundation for his house, and to erect it, in such manner as he thought proper, on his

own ground. The plaintiff, who built his house three years before, exercised the same right. The mere prior occupation of his ground, by the plaintiff, cannot exclude the defendant from the exercise of his right to use his own property. (*Platt v. Johnson*, 15 *Johns. Rep.* 213.) The plaintiff ought to have foreseen the natural and proper use which the defendant would make of the adjoining lot, and have laid his foundation accordingly. Since the commencement of this suit, the legislature have passed an act (*April 10th, 1818, 41st sess. ch. 106.*) *relative to the foundations of buildings in the city of New-York*, which requires the foundation of buildings erected after the first of *May*, to be *six feet*, at least, below the level of the street in front. The plaintiff's foundation is only three feet and a half. The maxim *sic utere tuo, ut alienum non ledas*, does not apply so as to prevent the owner of a lot of ground contiguous to another, from using his ground to the best advantage. Again; no action lies in a case like the present. It has been long a decided *principle of the common law, that if a man builds a house, and makes a cellar upon his soil, whereby a house newly erected in adjoining soil falls down, no action lies. (2 *Rolle's Abr.* 565. l. 5. 1 *Sid.* 167. 1 *Comyn's Dig.* 305. *Action on the case for a nuisance*, (C.) 1 *Lev.* 122.) In *Thurston v. Hancock*, (12 *Mass. Rep.* 220.) the Supreme Court of *Massachusetts* decided this very question, on the authority of the cases in *Rolle* and *Siderfin*.

3. Even if the defendant was liable to an action, it could only be on the ground of negligence, or unskilful management; he is not liable at all events. (*Clark v. Foot*, 8 *Johns. Rep.* 421.) The jury were, therefore, misdirected as to the law.

4. But if the question of negligence, or not, had been left to the jury, the evidence would not have supported the verdict.

Slosson, contra. Before the act of *April 10, 1818*, there was no statutory regulation on this subject. This case must, therefore, be decided on the principles of the common law.

1. As to the objection to the declaration; the allegation is not that the act was done maliciously. The malicious intention is matter of form merely, thrown in to justify the claim for greater damages. "If a malicious or wrongful intent be unnecessarily stated, it need not be proved." (1 *Chitty's Pl.* 378.) In *Williamson v. Allison*, (2 *East's Rep.* 452.) *Lawrence, J.*, says, "With respect to what averments are necessary to be proved, I take the rule to be, that if the whole averment may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it." (*King v. Phillips*, 6 *East's Rep.* 473.) If digging away the ground, so as to injure the plaintiff's house, without a malicious intent, will support the action, then the malicious intent need not be proved, but

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may be rejected as surplusage. (*Bayard v. Malcom*, 1 Johns. Rep. 469.)

2. It is a well settled principle, that a man must so make use of his own property, as not to injure his neighbor: *sic utere tuo, ut alienum non lædas*. (*Tenant v. Goldwin*, 6 Mod. 311—314.) A lawful act, or the exercise of a legal right, may be proper and harmless, or improper and injurious, according *to circumstances. The party who complains of injury must not, himself, have been in fault. The case of *Thurston v. Hancock*, from *Massachusetts*, went on the principle that the plaintiff, having ample room for placing his house, yet erected it so near his neighbor's land, that it must necessarily be injured, if his neighbor exercised his right to use his own property. The court say, that the plaintiff well knew the nature of the ground, and that it was impossible to dig there without causing damage; and that he built at his peril. In *Clark v. Foot*, setting fire to the plaintiff's own fallow ground, was not such an act as must necessarily prove injurious to his neighbor. Where a man shot a gun at a fowl near the door of his own house, by which he set fire to his own house, and that of his neighbor, he was held answerable in an action on the case, at the suit of his neighbor, though it was a mere misadventure. (*Cro. Eliz.* 10. *Anon.*) In *Smith v. Martin*, (2 *Saund.* 397.) which is the precedent from which the declaration in this case was drawn, there was a judgment for the plaintiff in the county palatine of *Chester*, which, on error, was affirmed in the court of K. B. In the case of *Sir John Slingsby v. Barnard* (1 *Roll. Rep.* 430.) there was no allegation of negligence on the part of the defendant, in digging his cellar so near the foundation of the plaintiff's house that it fell down, yet the action was sustained; for the act itself was necessarily attended with injurious consequences. If the act of the defendant is lawful, the plaintiff should allege that it was done negligently; otherwise, if the act is unlawful. In the case cited from 2 *Roll. Abr.* 565, *Rolle* adds, "But it seems that a man who has land next adjoining my land, cannot dig his land so near my land, as to cause my land to fall into his pit; and, therefore, if an action should be brought for this, it will lie." On what principle would such an action lie, unless because the act done was such as would, probably, or necessarily, prove injurious to another. The Supreme Court of *Massachusetts* appear to have misapprehended the principle on which this action is founded. They admit that an action will lie for the loss of soil, but not for damage caused to the plaintiff's house. "A man," says Ch. J. *Parker*, "in digging upon his own land, is to have regard to the position of his neighbor's land, and *the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not

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or the value of a house put upon, or near, the line, by his neighbor; for, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest." They seem, also, to have proceeded on some notion of a prescriptive, or exclusive right, and cite the case of *Palmer v. Fleshees*, (1 Sid. 167.) which was an action on the case for stopping lights. But an action for loss of soil is not founded on any prescriptive right. There was no direct or immediate injury in the case of *Thurston v. Hancock*. The plaintiff might have prevented all damage, by erecting a wall to keep up his ground. The local circumstances were very different from the present case. Almost all the building lots in this city are only 25 feet wide; and every owner who erects a house must necessarily occupy the whole width of his lot. It cannot be said to be an act of folly to build so near his neighbor's lot; he must build, if at all, directly on the line; and digging a cellar in the adjoining lot necessarily endangers the house already erected, unless great care is used. If a man has a fancy for some new plan, or to erect a house with a greater number of stories, and for that purpose digs a foundation so deep as to undermine his neighbor's house, he ought to be answerable for the damage. The legislature must have so understood the law, when they declare, in the *second* section of the act which has been cited, that where the foundations of buildings, in the city of *New-York*, at the 1st of *May*, 1818, are not laid in conformity to the act, the owner "shall be barred from the recovery of any damages such building may hereafter sustain, by erecting any building or foundation adjoining thereto, in pursuance of the provisions of the act: *Provided* that ordinary care be taken in erecting such buildings, or in laying such foundations." This is a strong expression of the legislative sense of the doctrine of the common law, which, we contend, supports this action. All the precedents to be found in these cases are conformable to the one in *Saunders*, and no doubt is suggested but that such an action well lies.

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*WOODWORTH, J., delivered the opinion of the court. The plaintiff alleges, in his declaration, that the defendant, "maliciously intending to injure the plaintiff, and to deprive him of the use and advantage of his messuage, dug up the soil of a certain lot contiguous, whereby the foundation walls were subverted, and a great part of the messuage foundered and fell, and the residue was greatly broken and shattered."

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At the trial, the defendant moved for a nonsuit, on the ground that, the declaration being founded on the *malfeasance*, and not the *misfeasance*, of the defendant, the question of negligence or unskilfulness could not arise; that the declaration was not supported by the evidence, inasmuch as it appeared that the defendant dug on his own ground, which was lawful

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in itself, and it did not appear that the act was done maliciously. The motion for a nonsuit was properly denied.

If the plaintiff had stated, in his declaration, that the act was done *maliciously*, further proof would have been necessary. It would then be a case of *malfeasance*, an inquiry distinct in its nature from a case where damages are claimed, either on the ground of negligence or unskillfulness, or that the act complained of does, *of itself*, subject the party to damages, although done with the greatest care.

In the exercise of a lawful right, a party may become liable to an action, where it appears that the act was done maliciously.

Suppose *Holland* had declared, that he would exercise his right of digging on his own ground contiguous to the plaintiff's wall, not to benefit himself, but for the sole purpose of injuring the plaintiff; and digs, accordingly, below the plaintiff's foundation, but takes care that there be no ground for the charge of negligence or unskillfulness in the exercise of his right: considering himself safely intrenched within the protection of the law, he desists from further operations; his object is accomplished, the adjoining foundation is loosened, and the building materially injured: is there a question, that, in such a case, the party injured would be entitled to recover damages? The *gravamen* would, in the case put, arise from the fact, that the act was done *maliciously*, and testimony falling short of proving that it was so done, *would be insufficient to maintain the action, although it might show a just claim to damages, had the count been differently drawn. In my opinion, the plaintiff's case is not of this character. The allegation, "*maliciously intending*," I do not consider of the essence of the action, or descriptive of the manner of doing the act which occasioned the injury, and it may well be rejected as surplusage, still leaving a good declaration, to support which the proof was competent. In the case of *Williamson v. Allanson*, (2 *East*, 452.) *Lawrence*, J., says, "with respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out, without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." Now, apply this doctrine: if this averment be stricken out, still the declaration is good, and may be supported by proof of negligence or unskillfulness in the manner of doing the act. The plaintiff may declare, as in this case, or according to the precedents in 6 *Term Rep.* 411, 7 *East*, 368, and *Hen. Bl.* 267, that the injury was done by reason of negligence.

The next and important question is, whether the defendant

is liable, on the case made out at the trial, to damages for the injury to the plaintiff's house: "*sic utere tuo, ut alienum non lædas.*" is a maxim admitted to be correct; the extent of its application is to be considered. The plaintiff insists, that, without reference to the question of negligence, the defendant is answerable for the damages. On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously.

Platt v. Johnson and Root, (15 *Johns. Rep.* 213.) is a case analogous in principle to the present action. It is there decided, that a person erecting a mill and dam upon a stream of water running through his own land, does not, by *the mere prior occupation, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted, and he is in some degree injured.

The court say, that the maxim, before stated, "must be taken and construed with an eye to the natural rights of all. Although some conflict may be produced in the use and enjoyment of such rights, it cannot be considered, in judgment of law, an infringement of the right. If it becomes less useful to the one, in consequence of the enjoyment by another, it is by accident, and because it is dependent on the exercise of the equal rights of others."

Baron Comyns lays down the rule generally, that an action on the case does not lie for a reasonable use of one's right, though it be to the annoyance of another, and he puts the case: "If a man build a house, and make cellars upon his soil, whereby a house newly built in an adjoining soil falls down." He refers to 2 *Roll. Ab.* 565. and 1 *Sid.* 167. which fully support the doctrine.

In 8 *Johns. Rep.* 421. (*Clarke v. Foot*) the court have decided, that if a man sets fire to his own fallow ground, as he may lawfully do, which communicates to, and fires the woodland of his neighbor, no action lies, unless there was some negligence or misconduct in him or his servants.

All these cases go on the ground, that a possible damage to another, in the cautious and prudent exercise of a lawful right, is not to be regarded, and if a loss is the consequence, it is "*damnum absque injuria.*"

The case of *Thurston v. Hancock* and others, (12 *Mass. Rep.* 220.) is in point: in that case the plaintiff built a house on his own land, within two feet of the boundary line, and, ten years after, the owner of the adjoining land dug so deep into his own land as to endanger the house; and the owner of the house, on that account, left it, and took it down; it was holden, that no action lay for the owner of the house, because

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the defendants having the entire dominion, not only of the soil but of the space above and below the surface, could not be restrained in the exercise of their right, unless by covenant, or by custom; that the house in question had not the qualities of an ancient building, so that the plaintiff *could prescribe for the privilege of which he had been deprived; and that a man who builds a house adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land.

The case from *Roll. Rep.* 430, cited by the plaintiff's counsel, is the only one I have met with which goes the length of supporting this action.

No objection appears to have been taken in that case to the right of action, but only to the form of the declaration; neither does it appear whether the defendant confined himself, in digging, to his own land. Chief Justice *Parker* says, "it seems impossible to maintain that case upon the facts made to appear, without denying principles which seem to have been deliberately laid down in other books equally respectable as authorities."

The result of my opinion is, that the plaintiff has not shown a right to recover damages in this case, unless it be on the ground of negligence, in not taking all reasonable care to prevent the injury. That is a question of fact which has not been submitted to the jury. They were directed to find a verdict for the plaintiff, for the difference in value of the house before the injury, and afterwards. The charge was incorrect: a new trial must, therefore, be granted, with costs to abide the event of the suit.

New trial awarded.

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*WELLER against WAYLAND.

A bill of sale, executed to secure the grantee from his liability as endorser of a promissory note, for the accommodation of the grantor, is not fraudulent and void under the Statute of Frauds, (sess. 10. c. 10. § 2.) as against an execution subsequently issued by a judgment creditor.

THIS was an action of trespass *de bonis asportatis*, which was tried before Mr. J. *Spencer*, at the *Orange* circuit, in *September*, 1817.

In *February* term, 1814, of the Court of Common Pleas of the county of *Orange*, *Sally Ann Barclay* recovered a judgment against *William Gorham* and wife, for 208 dollars and 32 cents, damages and costs, which was docketed on the 2d of *March* following. On the 28th of *February*, in the same year, *Gorham*, who was a tobacconist, by bill of sale, expressed to be for the consideration of 1,500 dollars, "being the amount of two notes endorsed by the plaintiff, and on the day of the date discharged for *Gorham*," bargained and sold to the plaintiff,

And if the grantee allow part of the goods comprised in the bill of sale, to remain in the possession of the grantor, or redeliver them to him, although these goods are subject to an execution, yet the right of the grantee, as to the residue, is unimpaired, and they cannot be levied on by execution.

all the goods, wares, merchandises, household stuff, and furniture, mentioned in a schedule thereunto annexed, of which *Gorham* put the plaintiff in full possession, by delivering to him 1,000 cigars, at the time of the sealing and delivery thereof, in the name of the whole premises. The property in question, being twenty kegs of tobacco, valued at ten dollars each, was among the goods specified in the schedule. To prove the consideration of the bill of sale, the plaintiff produced in evidence two promissory notes, drawn by *Gorham*, and endorsed by the plaintiff; one dated the 18th of *July*, 1814, for 1000 dollars, payable in 90 days, at the bank of *Orange* county, and the other dated the 14th *January*, 1814, for 500 dollars, payable in 60 days at the Middle District Branch Bank at *Kingston*. Upon the last-mentioned note, there was an endorsement of the cashier of the Middle District Branch Bank, that the contents of the note had been received of the plaintiff, on the 28th of *February*, 1814; and it was testified by the cashier of the bank of *Orange* county, that the note for 1000 dollars, was discounted at his bank, for the accommodation of *Gorham*; that, when it fell due, the plaintiff gave his own note, with a new endorser; and that, this note having been renewed once or twice, a suit was *finally brought against the plaintiff for the amount, and judgment being recovered, it was levied on the plaintiff's property.

Lowry, a witness on the part of the plaintiff, and who was a foreman in *Gorham's* store, at the time of the execution of the bill of sale, stated that the plaintiff was put into the full and absolute possession of *Gorham's* stock in trade, and took the keys of the store. The plaintiff then employed the witness to conduct the business of the store, and manufacture the tobacco on hand. The witness had the entire management of the business, and kept the accounts, but was occasionally assisted by *Gorham*, who, sometimes, made sales, at the request, or during the absence of the witness; and paid over the money which he received to the plaintiff. Other witnesses were introduced, in the course of the trial, on the part of the plaintiff, in corroboration of the testimony of *Lowry*, and the defendant offered several witnesses to disprove the fact of delivery of possession from *Gorham* to the plaintiff. It was stated, that *Gorham's* sign was not removed from the store, on the transfer of the property; and that the plaintiff gave back to *Gorham* some articles of household furniture mentioned in the schedule, for the accommodation of his family.

An execution, having been issued upon *Barclay's* judgment, was delivered to the defendant, then a deputy of the sheriff of *Orange* county, who, on the 3d of *March*, levied upon the goods in question, and afterwards sold them for the purpose of satisfying the execution.

The judge charged the jury, that, if the testimony of *Lowry* was to be believed, he had the possession of the property, as

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agent for the plaintiff; that it was not necessary that it should have been removed; that although part of the property mentioned in the bill of sale may have remained in the possession of *Gorham*, yet that would not affect the part of which *Lowry* had the possession for the plaintiff, as the bill of sale might be good and operative as to the articles delivered, and void and inoperative as to the residue; that the officer had acted at his peril, and that the plaintiff was entitled to recover the value of the property taken.

The jury found a verdict for the plaintiff, which the defendant *moved to set aside, on the merits, and also on an affidavit of newly discovered evidence, which was, that the note for 500 dollars, was not paid by the plaintiff, on the 28th of *February*, as stated in the endorsement on that note, but that another note was given in lieu of it.

Fisk, for the defendant, contended, 1. That the bill of sale by *Gorham*, to the plaintiff, was made for the purpose of defeating *Mrs. Barclay's* execution, and was, therefore, fraudulent and void. There being a consideration for the sale, will not take it out of the statute; (*Cadogan v. Kennett*, *Cowp.* 432.) it being a shift, or contrivance, to defeat a creditor.

Again; unless possession accompanies, and follows such a deed, it is fraudulent and void. (2 *Term Rep.* 587. note. 1 *Cranch*, 309. *Sturtevant v. Ballard*, 9 *Johns. Rep.* 337.) The possession of the vendee must be exclusive, and entire. A joint possession with the vendor is fraudulent. It must be a *bona fide* and exclusive possession. (1 *Esp. N. P. Cases*, 205. 1 *Campb. N. P. Rep.* 332.)

2. The judge's charge was incorrect. A deed void in part, is void in toto. (*Hyslop v. Clarke*, 14 *Johns. Rep.* 458.)

Bristed, contra. The possession of the vendor is only *prima facie* evidence of fraud, and may always be explained. (*Storm & Beekman v. Woods*, 11 *Johns. Rep.* 110.) The plaintiff's claim is for the tobacco, which was transferred and delivered to him on the 28th of *February*, by delivering to him 1000 cigars in the name of the whole.

Again; the plaintiff was a *bona fide* creditor of *Gorham*; and a debtor may lawfully prefer one creditor to another. The statute of frauds does not apply between creditors. (2 *Johns. Ch. Rep.* 283. 306. 14 *Johns. Rep.* 463.) An execution does not bind personal property, until delivered to the sheriff; nor, indeed, until executed. (12 *Johns. Rep.* 320. 324. 164. 403. 536.)

Per Curiam. The bill of sale was not fraudulent within the statute of frauds, (sess. 10. c. 10. § 2.) if made to secure a creditor his debt; though the effect of it might be to postpone **Mrs. Barclay's* execution (2 *Johns. Ch. Rep.* 307, 308, 309.)

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2. The doctrine of the case of *Hyslop v. Clark*, (14 Johns. Rep. 462.) does not apply, for the bill of sale is not made void by the statute; and if by matter *ex post facto*, such as leaving part of the household goods in *Gorham's* possession, as to which the execution of Mrs. *Barclay* might operate, this cannot invalidate the bill of sale itself, which, in its inception and consummation, was not fraudulent.

3. The discovery of new evidence, that *Gorham's* note was not actually taken up, is immaterial. The plaintiff was the endorser, and had a right to be secured. (a)

Motion denied.

(a) A bill of sale, or assignment of goods, declaring that the object is to secure the vendee as surety for the vendor, and that in case the vendee shall become liable, that he may turn the goods out on execution, or that they should be at his disposal at private sale, accounting to the vendor for the proceeds, is in the nature of a mortgage, the possession of the vendor consistent with the face of the deed, and therefore not evidence of fraud, as to creditors. *Marsh v. Lawrence*, 4 Cowen, 461.

The President, Directors & Co. of the BANK OF NEW-YORK against M. EDEN.

IN this, and eight other causes, between the same parties, judgments were entered up and docketed, in favor of the plaintiffs, against the defendant, in 1800 and 1801, amounting together to about 17,000 dollars; but no executions had been issued thereon. The defendant was duly discharged from his debts, on the 20th of August, 1801, under the insolvent act of the 20th of March, 1788.

M. S. Wilkins, for the plaintiffs, at the last term, moved for leave to issue writs of *scire facias* to revive the judgments, in order to take out executions thereon. He read affidavits of the due service of notice of the motion on the defendant; and that the judgments were now justly due, and remained unpaid and unsatisfied; and that the defendant *was living. He cited 6 Bac. Abr. 108. 2 Bl. Rep. 995. *Lansing v. Lyons*, 9 Johns. Rep. 84. 1 Inst. 290. b.

Burr, contra, contended, that the application ought not to be granted. He said the statute of *Westminster 2d* had not been re-enacted in this country; and that a *scire facias* was, therefore, a creature of the court, and subject to its control. It is agreed, both in *England* and here, that, after ten years, a *scire facias* cannot issue, as of course, or at the discretion of the court, but a motion must be made, founded on

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Where a judgment is above ten and under twenty years' standing, the plaintiff must apply to the court for leave to issue a *scire facias*, supported by an affidavit of its being unpaid; and if the judgment be more than twenty years' standing, there must be service of the notice of motion and affidavit; or a rule to show cause. Where a judgment is above twenty years' standing, the court have discretion to grant or refuse the application for a *scire facias*.

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davit; or a rule to show cause.

Where a judgment is above twenty years' standing, the court have discretion to grant or refuse the application for a *scire facias*.

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affidavit, or *notice*, to the defendant, to show cause. If he is to show cause, as outlawry of plaintiff, release, or payment, and the facts are denied, the *scire facias* will be refused. It would be absurd to call on a party to show cause, unless the court felt themselves authorized to interfere in his behalf.

In the present case, the facts are not denied. The defendant has obtained a regular discharge under the insolvent act of 1788. The court can now decide the question, as to the validity of that discharge, as well as to put the parties to a suit, and to the expense of pleading. By allowing a *scire facias*, the court will admit that the decision of the Supreme Court of the United States (*Sturges v. Crowninshield*, February, 1819.) has annulled the insolvent act of 1788, since which act landed property, to an immense amount, has passed through the hands of insolvents.

The *English* insolvent acts give a *scire facias*, as to the future acquisitions of the debtor. But the bankrupt law of *England*, to which our insolvent act of 1788 is analogous, gives no such process. There is no process to be found, of a *scire facias* issued against a debtor who had obtained a regular discharge.

Per Curiam. Where a judgment is above *ten years'* standing, the plaintiff must apply to the court, for leave to issue a *scire facias*, supported by an affidavit, that the judgment remains unsatisfied. (2 *Salk.* 598. *Hardisty v. Burney.*) If the judgment be of more than *twenty years'* standing, the plaintiff must give *notice* of the motion, with a copy of the affidavit, to the defendant, or move for a *rule to show cause, why a *scire facias* should not issue. In the latter case, the court would have a discretion over the question, to deny the motion, or not; but where the judgment is less than *twenty years'* old, they have no power to refuse the application. We have no settled rule of practice, different from that of the King's Bench in *England*, and, therefore, adopt it. (2 *Tidd's Practice*, 982. 1000. 1007.) Though we may regret the consequences of this decision, yet we must be bound by the established rules of law.

Motion granted. (a)

(a) Before the statute of *Westminster* 2d, 13 *Edw.* I. c. 45. if the plaintiff in a personal action had, after obtaining judgment, lain quiet for a year, he was put to a new action on the judgment. This statute was re-enacted by the legislature. (Sess. 10. ch. 50. s. 34. 12th *March*, 1787, 1 *N. R. L.* 79. 2 *Revised Statutes*, 576. § 1.) In *Coysgame v. Fly*, (2 *Bl. Rep.* 995.) it is said that the Court of King's Bench, on a judgment of twenty years old, gave leave (according to a precedent said to have been settled nine years before) to an administrator of the plaintiff, to sue out a *scire facias* to revive the same: but that no execution should be taken out, until either the sheriff made an actual return of *scire feci*, or an affidavit was made and filed, of personal notice on the defendant, of suing out the *scire facias*. Leave was given, in *Bagnall v. Gray*, to take out a *scire facias* on a judgment of ten years' standing, but, according to a precedent settled 6 *Geo.* III. in *Yarker v. Reynoldson*, no execution was to

ALBANY,
August, 1819.*ROOSEVELT *against* CEBRA, impleaded with CHAMP-
LIN.ROOSEVELT
v.
CEBRA.

THE plaintiff, on the 8th of *February*, 1811, obtained judgment in this court, against the defendants, for 3,033 dollars and 19 cents: on the 24th of *June*, 1811, the defendant, *Cebra*, was regularly discharged by the recorder of *New-York*, under the act of the 3d of *April*, 1811, entitled, "An act for the benefit of insolvent debtors and their creditors." At the time when the debt on which the judgment was obtained was contracted, and ever since, the plaintiff and defendants have been residents in *New-York*. No execution was issued on the judgment until some time in *April* last, when the plaintiff caused a *fieri facias* to be issued against the goods and chattels, lands and tenements of the defendants.

A discharge under the insolvent act of the 3d of *April*, 1811, does not discharge a debt contracted prior to the passing of that act, which, as impairing the obligation of the contract, is unconstitutional and void.

At the last *May term*, a motion was made in behalf of the defendant to set aside the execution. Similar motions were made in other causes. Vide *Mather v. Bush* (16 *Johns. Rep.* 233. 254.)

D. B. Ogden and Wells, for the defendant.

T. A. Emmet, for the plaintiff.

Per Curiam. We have considered this case, since the last term. As the contract on which the judgment was founded, was made prior to the passing of the insolvent act of the 3d of *April*, 1811, we cannot distinguish it from the case of *Sturges v. Crowninshield*, (a) decided by the Supreme Court of the *United States*. The motion to set aside the execution must, therefore, be denied. Without entering into a further discussion of the question, we shall content ourselves with referring to the opinion of this court, in the case of *Mather v. Bush*, (b) at the last term, and with expressing our regret at the injurious consequences which must result from a decision which we have been compelled *to pronounce, in obedience to the constitution of the *United States*, and what is now the law of the land.

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Motion denied.

issue unless on a return of *scire feci*, or on affidavit of personal notice to the defendant. (2 *Bl. Rep.* 1141.)

(a) Vide 4 *Wheaton's Rep.* 122.

(b) See note to *Mather v. Bush*, 16 *Johns. Rep.* 233. and the cases there cited.

ALBANY,
August, 1819.



Case of Costs.

A question was submitted to the consideration of the court, as to the taxation of *Costs*; where a suit has been brought in this court, and, from the amount recovered, the plaintiff is entitled only to the costs of the Court of *Common Pleas*, whether, under the act of the 21st of *April*, (sess. 41. ch. 259.) *to prevent abuses in the practice of the law, and to regulate costs in certain cases*, the amount of costs is to be limited to the sums specified in the *tenth* section of the act?

The Court said that the plaintiff could recover only according to the existing rate of costs in the Court of *Common Pleas*.

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END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1819, (a) IN THE FORTY-FOURTH YEAR OF OUR
INDEPENDENCE,

CURTISS *against* LAWRENCE.

THIS was an action of slander, and the damages were laid in the declaration at 1,000 dollars. The jury found a verdict for the plaintiff for 4,250 dollars.

Storrs, for the plaintiff, now moved for leave to amend the declaration, by increasing the amount of damages stated.

Davis, contra.

Per Curiam. The plaintiff may state, in his declaration, his damages to any amount he pleases; and he is the best judge of them. It would be error to enter up judgment on the verdict as it stands, and the plaintiff cannot have judgment, unless he enters a *remittitur* for the damages over and above the amount laid in the declaration. We have no power to allow the amendment.

Where the plaintiff, in an action of slander, laid his damages at 1,000 dollars, and the jury found a verdict for the plaintiff for 4,250 dollars, the court refused to allow the declaration to be amended, by increasing the amount of damages alleged.

Motion denied. (b)

(a) The court sat, during this term, at *Albany*, instead of *New-York*, by appointment of the governor, who, during the last vacation, issued his proclamation for that purpose, pursuant to the 16th section of the act "concerning the Supreme Court," (sess. 36. c. 3.) on account of a pestilential disease prevailing in the city of *New-York*.

(b) Vide *Livingston v. Rogers*, 1 *Caines's Rep.* 584. 589.

ALBANY,
October, 1819.

CHASE
v.
DAY.

regular charge was made by the plaintiff in his books, of account against the defendant or his nephew; but the plaintiff kept a written memorandum of the number of papers delivered weekly to the various post riders, and the name of the defendant's nephew appeared in that list, as one of the post-riders to whom the papers were furnished weekly.

On this evidence, the justice gave judgment for the plaintiff below for 25 dollars and costs.

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Per Curiam. Here was a promise to pay for the papers by the defendant below, before they were delivered to a third person; and the only question is, whether the credit was given originally and solely to the defendant. The evidence *fairly warrants the construction, that the credit was so given; and, therefore, it is not within the statute of frauds, requiring a note in writing, in order to charge one person for the debt or default of another. This was never the debt of the nephew. His uncle made the contract; and the nephew, when he took the papers, explained that his uncle would be responsible for them. It was not a *collateral* agreement, but an *original* and absolute contract on the part of the defendant, for the price of the papers to be furnished for the use of his nephew. The judgment of the court below ought, therefore, to be affirmed.

Judgment affirmed. (a) (b)

(a) In *Jones v. Cooper*, (Cooper, 227.) Lord Mansfield took a distinction, that "where the undertaking is *before delivery*, and there is a direction to deliver the goods, and I will see them paid for, it is not within the statute of frauds." But in *Martin v. Wharman*, (2 Term Rep. 89) the court said, that distinction had been overruled. Though Buller, J., said, that the reason of Lord Mansfield struck him forcibly, and that if it was a new question, his mind would be the other way; yet, now, the authorities were not to be shaken; and "the general line taken is, that, if the person for whose use the goods are furnished, be liable at all, any other promise by a third person to pay that debt, must be in writing, otherwise it is void by the statute of frauds." (Bull. N. P. 280, 281, 282. 2 East's Rep. 325. 1 Hen. Bl. 120. Keate v. Temple, 1 Bos. & Pull. 158.) The question is, To whom was the original credit given?

(b) So, where the plaintiff was endorser of a note made by B. for his accommodation, and B., who was also indebted to the plaintiff, having a sum of money and goods, with which he was ready to pay the note, &c., and to secure the plaintiff, it was agreed between the plaintiff, B., and the defendant, that B. should place the money and goods in the hands of the defendant, who should pay the note, &c., and B. accordingly delivered the money and the goods to the defendant, who thereupon undertook to pay the note, &c.: *held* that this was not a promise or undertaking, for the debt or default of another, within the statute of frauds; and the defendant having failed to perform his agreement, the plaintiff is entitled to recover damages for the breach of the contract. *Olmsted v. Greenly*, 18 Johns. Rep. 12. *Furley v. Cleveland*, 4 Cowen, 432. 9 Cowen, 639. *Chapin v. Merrill*, 4 Wendell's Rep. 657.

ALBANY,
October, 1819.*CRESSON and others *against* STOUT

CRESSON

v.

STOUT.

THIS was an action of *replevin*, tried before Mr. Justice *Van Ness*, at the *Rensselaer* circuit, in 1818. The property for which the suit was brought, consisted of two frames for spinning flax, a frame for spinning tow, and two carding machines, and was, at the time of the commencement of the action, in *March*, 1817, in the store of *Jabez Burrows*, in *Troy*. The plaintiffs alleged, that the defendant had taken the articles from their possession and factory in *Schaghticoke*, in *Rensselaer* county.

The defendant pleaded, 1. *Non cepit*; 2. Property in the defendant.

On the trial, the plaintiff produced a mortgage from *Josiah Chapman* and his wife, to the plaintiffs, dated *April 21*, 1815, for a piece of land in *Schaghticoke*, "together with the machinery for manufacturing flax and hemp, and for spinning the same with thread or yarn, and the watercourse thereunto belonging." The mortgage was registered the 25th of *May*, 1815. It was proved that the frames for spinning tow, and the two carding machines, were in the factory, at the date of the mortgage; but that the two frames for spinning flax were placed in the factory, in *August* or *September* following, by *Chapman*, the mortgagor; and that they were all removed by the defendant, in *February*, 1817, to *Burrows's* store in *Troy*. That, on the 30th of *September*, 1816, the mortgagor delivered to the plaintiffs, the mortgagees, possession of the factory and all the machinery and articles then in it, comprising the articles in question, and, as the witness understood, as security for the mortgage debts. The plaintiffs immediately put a tenant into possession of the factory and machinery, who left the premises *in *October*; and the witness, with his leave, went into possession, but paid no rent, and held the premises, at the will of the plaintiffs. On the 13th of *November*, the defendant told the witness, that he had bought the property and machinery at the sheriff's sale, and that the witness must take a lease of it, which he did. The carding machines were fastened to the floor with wooden pins, and the frames for spinning flax and tow were fastened by upright pieces, extending to the upper floor; and cleets were nailed to the floor round the feet; but neither of them were nailed to the building, and might be raised and removed by a strong man.

The plaintiffs having rested their cause, the defendant's counsel moved for a nonsuit, because the property was taken from the possession of the tenant, not from that of the plain-

If a sheriff makes a levy on goods on one execution, and afterwards a second execution comes to his hands, the levy is sufficient for both, and he may sell the goods on the second execution, as well as on the first.

The sale of goods under a *fi. fac.* ought to be at the place where the goods are situated, so that they may be specifically seen and examined. And where a sale was made six miles distant from the goods, it was held irregular and void. Selling real and personal estate, or chattels, together, without any discrimination, is irregular.

Replevin does not lie for things fixed to the freehold; but if, after the sheriff has levied on them, they are severed, they become personal property, and may be replevied.

It seems that machinery for spinning flax and tow, and carding machines, used in a manufactory, and which were attached to the building, by an upright board resting on the frames, and fastening the machines or

joined at the ceiling, and by cleets nailed to the floor round the feet of the frames, but frames, themselves, not nailed to the building, are not fixtures, but personal property.

Personal property is bound from the time the execution is delivered into the hands of the sheriff.

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tiff; and because the machinery, being fixed to the freehold, was real estate, and not the subject of replevin; but the judge denied the motion.

Horace Turner, a witness for the defendant, testified, that he was the under sheriff, and that there were several executions against *Chapman*; under one of which, in favor of *Hudson*, tested *August*, 1816, and issued the 24th of *September*, on a judgment docketed the 20th of *September*, 1816, the factory and machinery were taken; and he sold the real estate, as well as the machinery, at *Troy*, six miles distant from the factory. He put up for sale the machinery as chattels real, with the factory, &c., and the defendant became the purchaser. The execution was at the time in the hands of *Brockway*, another deputy sheriff. Two prior executions were in the hands of the sheriff, one on the 30th of *July*, and the other on the 17th of *September*, 1816, which, the under sheriff stated, were satisfied out of the other personal property sold. The money received from the sale of the factory and machinery, was paid into the hands of *Brockway*, on the execution he held, and he gave the deed to the purchaser. This deed, which was produced, was dated *November* 13, 1816, for the consideration of five dollars. The witness stated, that he and *Brockway* acted together, as to the sale of *Chapman's* property; that he did not know on which of the executions he made the levy on the property in the factory. He merely made an *inventory; he did not remove the machinery from the factory; nor did he, until after the sale, lock it up. That at the sale, at *Troy*, it was agreed between *Hudson* and *Stout*, that if *Stout* would not bid against *Hudson* when a stone-ware factory was put up for sale, that *Hudson* would not bid against *Stout* when the factory and machinery in question were put up. *Hudson*, who was sworn as a witness for the defendant, said, he recollected no such agreement with the defendant; that he did not know that the factory and machinery were to be sold under his execution; and that, as there was a dispute about the property, he refused to bid upon it.

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Tillman, a witness for the defendant, testified, that the property was sold at *Stout's* request, and the witness advised *Hudson* to put it up, and it was sold subject to the mortgage; he also confirmed the evidence of the deputy sheriff, as to the agreement between *Hudson* and the defendant, not to bid against each other.

Brockway, the deputy sheriff, said, that he advertised the sale of the factory and machinery; that he levied on the property of *Chapman* in *Troy*, but not on the factory and machinery, that he and *Turner*, the other deputy sheriff, acted jointly and in concert, as to the executions in their hands, respectively.

The machinery was proved to be worth about 2,500 dollars.

The judge directed the jury to pass upon two questions of fact: 1. Whether *Hudson* and *Stout* agreed not to bid against

each other, as testified by *Turner*; and 2d. as to the value of the machinery. The jury said, that they found that there was no such agreement between *Hudson* and the defendant, as had been stated by *Turner*; and that the value of the machinery was 2,500 dollars, when it was replevied. The parties thereupon agreed to take a verdict for the 2,500 dollars, subject to the opinion of the court, on the whole case, and the finding of the jury.

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Mitchill, for the plaintiffs, contended, 1. That the plaintiffs had shown a right of *property* in the machinery, under the mortgage. Though the machinery was not nailed to the freehold, yet it was essential to the purposes of the *factory, and was so far attached to it, as was necessary for the use of the manufactory, which could not be enjoyed without it. In *Heermance v. Vernoy*, (6 *Johns. Rep.* 5.) the court inclined to consider a *bark mill* as personal property; and in *Elwes v. Maw*, (3 *East's Rep.* 38.) all the cases and authorities on this subject are so fully stated and examined, that it is barely necessary to refer to that case. Whether the machinery is to be regarded as *real* or *personal* property, it equally belongs to the plaintiffs. If it was real property, it passed under the mortgage; if personal property, it was transferred, by delivery to the plaintiffs, before the sale under the execution.

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2. The plaintiffs showed a sufficient *possession*, and a *taking* out of their possession, to maintain this action. A *constructive* possession is sufficient in *trover*, which is analogous to *replevin*. (*Bristol v. Burt*, and *Shotwell v. Few*, 7 *Johns. Rep.* 254. 302.) *Replevin* lies for any *tortious* or unlawful taking of goods. (*Pangburn v. Patridge*, 7 *Johns. Rep.* 140.) Again; *Trask* and *Wilcox*, as tenants at will of the plaintiffs, were in the actual possession of the property; and which must, therefore, be deemed the possession of the plaintiffs. A *constructive* possession of personal property is sufficient to enable the plaintiff to maintain *trespass*. (*Putnam v. Wiley*, 8 *Johns. Rep.* 432. *Campbell v. Arnold*, 1 *Johns. Rep.* 511.) A *constructive* possession is a right of present possession. (1 *Term Rep.* 480. 4 *Term Rep.* 489. 7 *Term Rep.* 9.) A felonious taking from a person in the constructive possession of a chattel, is *larceny*. (1 *Hawk.* 35. 136. note. *Kelyng's Rep.* 81, 82. *Cowp.* 294. 296. *Leach's Cases*, 242. 349.) Having the goods is sufficient evidence of the taking, in *replevin*. (*Walton v. Kersop*, 2 *Wils.* 355.) There was, therefore, sufficient evidence to authorize the jury to find a *taking*, on the issue of *non cepit*. (1 *Chitty Pl.* 159.)

But it will be said, that *replevin* will not lie for any thing fixed to the freehold. (*Niblet v. Smith*, 4 *Term Rep.* 504.) True, if the thing is a *fixture* at the time the action is brought; but, if it is then severed from the freehold, it becomes a personal chattel, and *replevin* lies. If a stranger cut down a

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timber tree, during a term, the lessor may maintain **trover* for it against him. (*Berry v. Heard*, Cro. Car. 242.) This doctrine was recognized in *Gordon v. Harper*, (7 Term Rep. 13. per *Lawrence*, J.)

Again; it will be said, that the right of the plaintiff was divested by the sheriff's sale. If the property was personal, the sale was void, being six miles distant from the place where the property was, and not in the possession or view of the sheriff. (*Sheldon v. Soper*, 14 Johns. Rep. 352. 2 Johns. Ch. Rep. 312, 313.) The sheriff never did, in fact, levy on this property, under the execution on which it was sold.

Further; the sale was fraudulent and collusive.

Marcey, contra, insisted, that the machinery was so attached to the freehold as to become realty. The general rule of law is, that whatever is fixed to the freehold, becomes part of it, and cannot be taken away. It is true, that exceptions to this rule have, of late years, been made, as between landlord and tenant, and in favor of trade; (*Bull. N. P.* 34. *Woodfall's Tenant's Law*, 280. 288.) but the policy which has given rise to these exceptions does not apply to the present case. The ancient rule still exists, as it does between heir and executor, and is to be applied. In *Heermance v. Vernoy*, the bark mill was excepted, at the time the freehold was sold; besides, the court did not think it necessary to decide the general question as to its being a fixture. If, then, the machinery is to be deemed real property, replevin will not lie. (1 *Chitty Pl.* 157.) But this action is said to be analogous to *trover*. A tortious taking is necessary to maintain *replevin*, which is much more analogous to *trespass* than *trover*. Now, *trespass* will not lie, in regard to *real* property, unless the plaintiff is in the *actual* possession at the time the injury was committed. There is no *constructive* possession in such case. (1 *Chitty Pl.* 177.)

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Again; the plaintiff cannot set up a title to this property under the mortgage, in order to defeat the sale under the execution, for, in respect to the judgment creditors, it was fraudulent. The surrender or delivery of the property by *Chapman* was fraudulent, as against those creditors who had **issued* executions. His interest or equity of redemption might be sold under the executions in the hands of the sheriff. He had nothing, then, to deliver up to the plaintiffs.

To support the action of *replevin*, there must be a *taking* of the goods out of the *possession* of the plaintiff. (*Shannon v. Shannon*, 1 *Schoales & Lefroy*, 324. 7 Johns. Rep. 140.) It must be a *real*, not an equivocal possession.

As to the objection to the mode of sale under the execution: If it was real property, it was not necessary that the sale should be on the spot; and if it was personal, considering its nature and situation, and the levy made, it was not requisite that it

should be removed to *Troy*, and be present at the time of sale. After the sale of land under an execution, the defendant in the execution becomes *quasi* a tenant at will of the purchaser. (*Jackson v. Sternberg*, 1 *Johns. Cas.* 153. 3 *Caines*, 188.)

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PIATT, J., delivered the opinion of the court. If the articles of machinery in question be regarded as *real* estate, then, undoubtedly, the plaintiffs, as mortgagees in possession, before the sale, had a rightful possession; and the defendant, as purchaser under a junior judgment, had no right to take the machinery away. By the *severance*, the machinery became the *personal* property of the plaintiffs, who owned the realty from which it was severed; it is, therefore, a proper subject of *replevin*, though it may have been part of the freehold, when it was sold by the sheriff.

Upon examination of the authorities, so fully collected and so well summed up by Lord *Ellenborough*, in the case of *Elwes v. Maw*, (3 *East's Rep.* 28.) I am of opinion that the spinning frames and carding machines, situated as they were, are personal property; if so, then the two frames for spinning *flax*, which were not included in the mortgage, were bound by the execution which was delivered to the sheriff, *four* days before they were delivered and pledged to the plaintiffs, as security for their debt. The levy of the execution was sufficient. After having levied on goods with one *fi. facias*, if the sheriff receives a second *fi. fa.*, the first levy is sufficient for both executions.

*But I incline to the opinion that the sale on the *fi. facias* was irregular and void; because the sheriff sold the machinery at *Troy*, six miles distant from the place where the property was at the time; and because he sold the factory and machinery jointly together, without any discrimination. In *Sheldon v. Soper*, (14 *Johns. Rep.* 352.) the court said, "The sheriff did not even know the goods, or pretend to sell them specifically, and to sanction such sales would open a door to innumerable frauds." The same general principle, in order "to guard against fraud, and to preserve fairness and integrity at public auctions," was laid down in regard to the sales of real property by vague and general description, in the case of *Jackson, ex dem. Jones, v. Striker*, (1 *Johns. Cas.* 287. See also *Woods v. Morell*, 1 *Johns. Ch. Rep.* 502.)

Independently of the latter objection to the sheriff's sale, the plaintiffs would be entitled to recover for the one frame for spinning *tow*, and the two carding machines, the title to which was vested in them long prior to the judgment of *Hudson* against *Chapman*, whether it be regarded as real or personal estate; and on the ground of the objection to the mode of sale under the execution, I think the defendant acquired no right to the two frames for spinning *flax*. The court are, therefore, of

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opinion, that the plaintiffs are entitled to judgment for the whole machinery, according to the verdict.

Judgment for the plaintiffs. (a)

(a) *Vide Linnendoll v. Doe*, 14 Johns. Rep. 222. *Haggerty v. Wilber*, 16 Johns. Rep. 257.

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*JACKSON, *ex dem.* C. MILLER, *against* HIXON.

Where, on application to the surrogate, dower has been duly admeasured and assigned, pursuant to the statute, (1 N. R. L. 60. sess. 10. ch. 168. 2 Revised Statutes, 488.) and there has been no appeal or review of the proceedings, the admeasurement, until reversed, is conclusive, in an action of ejectment brought by the widow, as to the part she is entitled to recover.

THIS was an action of ejectment brought to recover lands assigned to the lessor of the plaintiff for her dower, as the widow of *Benjamin Depuy, jun.*, deceased, by admeasurers of dower, appointed for that purpose, by the surrogate of *Ulster* county, upon the petition of the widow. The cause was tried at the *Ulster* circuit, in *November*, 1818, before Mr. Justice *Yates*.

The counsel for the plaintiff offered in evidence the proceedings before the surrogate, and the report and admeasurement of the commissioners, which evidence was objected to by the defendant's counsel; because, by the order of the surrogate, it appeared, that the husband did not die seised, and the return of the admeasurers did not show that they had awarded the dower according to the situation and value of the land at the time of alienation. But the objection was overruled by the judge.

The plaintiff's counsel then read a notice served on the defendant's attorney, in the afternoon preceding the trial, to produce at the trial a deed from *Cornelius Bruyn* to *Benjamin Depuy, jun.* in fee, for a certain farm and tract of woodland, now possessed by the defendant; and, also, a deed from *Benjamin Depuy, jun.* to *Cornelius Bruyn*, for the same lands, and called on the defendant to produce the deeds, which not being done, the plaintiff proceeded to give parol evidence of their execution and contents, which was objected to, under the circumstances, but the objection was overruled by the judge. Two witnesses testified, that they were present at the execution of the deed of the premises, about the year 1783, from *Cornelius Bruyn* to *Benjamin Depuy, jun.* in fee, and subscribed their names as witnesses to the deed. That *Benjamin Depuy, jun.* continued in possession, as owner in fee, of the premises so conveyed, a number of years; and that, after he became so seised, he married the lessor of the plaintiff. That a mortgage was executed, at the same time, by *Depuy* to *Bruyn*, to secure the purchase money; and that *Depuy*, afterwards, reconveyed the premises to *Bruyn*, and lived a few years on the premises, as his tenant; and the same have, by several mesne convey-

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ances, become the property of the defendant. The admeasurers testified, that they surveyed the land and premises, and estimated the value according to its situation at the time it was owned by *Benjamin Depuy, jun.*

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From the proceedings before the *surrogate*, it appeared that, on the petition of the widow, he granted an order to three freeholders, as admeasurers, &c. "to lay off, as speedily as may be, one third part of the lands and tenements mentioned in the petition of the said *C. M.*, as, and for her dower, so as the same lands were possessed by the said *B. D.* during the coverture," &c.

The report of the admeasurers stated, that the premises consisted of a house, barn, and garden, and a piece of land, which they described by metes and bounds, and of which they allotted to the widow lots 1, 2, 3, 4, 5, and 6, as marked on a map annexed to their report, and which were particularly bounded and described. And they admeasured and allotted to the widow 16 feet and a half of the west end of the barn and stables, 6 and a half feet at the east end of the dwelling house of the defendant, with that part of the cellar underneath the same, and that part of the garret above the same, with the privilege of the stair-way into the garret and cellar, in common with the defendant; also, the use of a spring of water, and the foot-path leading thereto, and the privilege of the road to the barn, and the path to the garden, and of a road over the land of the defendants, to the lots so allotted to the widow.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case made.

Foot, for the plaintiff, contended, 1. That the parol evidence of the deeds, under the circumstances of the case, was properly received.

2. The dower having, in this case, been duly laid off by the admeasurers, pursuant to the statute, (sess. 10. ch. 168. s. 3. 1 *N. R. L.* 60, 61. 2 *Rev. Stat.* 488.) and no appeal having been made *from the proceedings by the surrogate, (s. 10.) it is conclusive.

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Sudam, contra. The return of the admeasurers of dower did not correspond with the order of the surrogate. It does not appear, that the husband died seised of the premises, nor that they made their estimation or admeasurement according to the value of the land, at the time of alienation. (*Dorchester v. Coventry*, 11 *Johns. Rep.* 510.) The admeasurers are required by the act, (s. 6.) to make a full and ample report of their proceedings to the surrogate, who is to enter the same as matter of record in his office. It is an *ex parte* proceeding under the statute, and the widow proceeds at her peril.

The defendant may object, that the dower has not been as-

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signed according to the value of the land at the time of alienation. The commissioners have no power to call a jury, and if the objection cannot be heard, the party is deprived of the right of having the fact tried by a jury. (2 *Johns. Rep.* 484.) The widow, in this case, has waited 14 or 15 years after the death of her husband, before she makes any application for dower. It is true, that the statute gives a right of appeal to this court, from the proceedings before the surrogate; but then the matter is heard on affidavit, and is to be tried by affidavit, not by a jury. (*Case of Watkins*, 9 *Johns. Rep.* 245. *Gardinier v Spikeman*, 10 *Johns. Rep.* 368.)

Again; the party is not bound to appear before the commissioners; and if he should appear, and inform them that he had witnesses ready to prove the facts stated, he would be told that the commissioners had no power to examine witnesses.

Foot, in reply. We did not rely on the proceedings before the surrogate as evidence of title; but produced the deeds, or evidence of their contents, which proved the seisin of the husband of the lessor. We referred to the proceedings, merely to show the extent to which the plaintiff was entitled to recover. The proceedings before the commissioners are not *ex parte*; notice of the application to the surrogate *must be given to the adverse party. (*Rathbun v. Miller*, 6 *Johns. Rep.* 281.) The statute has authorized a particular mode of ascertaining dower otherwise than by a jury.

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Per Curiam. The plaintiff proved that the lessor was entitled to dower, as the widow of *Benjamin Depuy*, jun., and that the admeasurers, by their report, filed in the surrogate's office, had assigned to her the lands, &c. now claimed, by certain metes and bounds. The defence consisted of exceptions to the proceedings and report of the admeasurers; because they had not pursued the order of the surrogate; and because they had assigned according to the value of the land at the time of *the death* of the husband, when they ought to have taken its value at the time of its alienation by him.

By the 10th section of the statute, the Supreme Court are authorized to "review the proceedings, and do therein what shall be just," provided the party aggrieved, within thirty days after filing the report of the admeasurers, gives notice, in writing, of the causes of complaint, and of his intention to apply to this court for relief: and then, "the question of seisin, and any other question which may arise, may be tried by a jury, or on a feigned issue, or in some other mode which the court may prescribe." (10 *Johns. Rep.* 368. 9 *Johns. Rep.* 245.)

Here has been no appeal or review; and, until the admeasurement is *reversed*, it must be conclusive, in an action of ejectment, as to the part belonging to the widow. We are of

opinion, therefore, that the plaintiff is entitled to judgment.

Judgment for the plaintiff. (a)

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(a) See *Jackson, ex dem. Totten, v. Aspell*, 20 Johns. Rep. 411. *Jackson v. Vanderheyden*, post. 168.

***HUBBARD against MACE.**

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STORRS, for the defendant, moved to set aside the *capias ad resp.* issued in this cause, and all proceedings thereon. It appeared, from the affidavits which were read, that the deputy sheriff arrested the defendant, about 2 o'clock, A. M., in his house. The front door of the defendant's house was fastened, and was not used for the purpose of entrance. The defendant had let part of the house to a tenant, and the only passage to that part of the house occupied by the defendant, was through the back door into the kitchen, which communicated by a door to the adjoining room, and through that to the room occupied by the defendant. The back door was open, when the deputy sheriff entered the house, and the inner doors were not locked or fastened: but as soon as the deputy raised the latch of the door of the defendant's room, the defendant held the door fast, so that the deputy sheriff could not enter, until he procured assistance, and forced the door open, when he made the arrest.

When the front door of the defendant's house was generally kept fastened, and the usual entrance was through the back door, and the sheriff, having entered by the back door, while it was open, in the night, broke open the door of an inner room in which the defendant was with his family, and arrested him, the arrest was held lawful.

J. Lynch, contra.

Per Curiam. If the fact that the outer door had been broken open had been clearly shown, we should have had no difficulty in granting the application. It appears, however, that the usual access to the inner rooms was through the back door and kitchen, which were open; and that the deputy sheriff used no more force than was necessary to break open the door of the room occupied by the defendant. The motion must be denied. (*Cowper*, 1.)

Motion denied.

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HARTWELL

v.

BISSELL.

Rye, growing in a field, was levied on by the sheriff, under a fi. fa., but not sold; and a collector of taxes, by virtue of a warrant against the defendant, afterwards, distrained upon, and sold the same field of rye for a tax: Held, that after the levy by the sheriff, under the execution, the rye was in the custody of the law; so that the collector had no right, afterwards, to sell it; and that the purchaser under him could not maintain trover against the purchaser under the sheriff, who, in harvest time, cut and carried away the rye.

*HARTWELL and others against BISSELL.

IN ERROR, on *certiorari* to a Justice's Court.

Bissell brought an action of *trover* against *Hartwell* and others, for a quantity of *rye* in the sheaf. It was proved, that the collector of taxes, by virtue of a warrant from the *super-visors* of the county, for the collection of a tax against *L. B.*, (brother of the plaintiff below,) amounting to three dollars and eighty-seven cents, on the 26th of *January*, 1818, sold a field of *rye*, of about five acres, to the plaintiff; and that the defendant, when the *rye* was ripe, at harvest, took, and converted it to his own use. The defendant justified under a judgment, and *fieri facias* issued thereon against *L. B.* The execution was delivered to the sheriff on the 6th of *December*, 1817, and he levied on the same field of *rye*, on the 12th of *January*, 1818, by going to the house of *L. B.*, (who was absent,) and informing his wife that he had levied on the field of *rye*. The sheriff sold the *rye* on the execution, after the distress and sale by the collector; but the execution was delivered to the sheriff, and the levy made by him, before the warrant issued to the collector. The cause was tried by a jury, who found a verdict for the plaintiff, on which the justice gave judgment.

Per Curiam. By the 9th section of the "Act for the assessment and collection of taxes," (2 *N. R. L.* 512. sess. 36. ch. 52. 1 *Rev. Stat.* 397. 398.) the collector is "authorized and required, in case of refusal or neglect to pay the taxes, to levy the same by distress, and sale of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his or her possession." The *rye*, having been levied upon by the sheriff, under the *fi. fa.*, though it was not then sold, was in the custody of the law, and not in the possession of *L. B.* The collector, therefore, had no right to sell it, and the purchaser under him acquired no title. We are of opinion that the judgment of the court below ought to be reversed.

Judgment reversed.

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RAWSON

v.

ADAMS.

*JOHNSON *against* PARMELY.

MOTION to set aside a report of referees. It was in an action of *trover* for a horse and two cows. After the cause was at issue, the parties entered a rule of reference, by consent, in the book of common rules, in the clerk's office. The report and affidavits were submitted to the court without argument.

Per Curiam. The affidavits show several incorrect decisions on the part of the referees, as to the admissibility of evidence; but we cannot interfere to set aside the report, which was in favor of the plaintiff, because it is not a case referrible under the statute. There is no pretence of any matter of account between the parties, in any manner connected with the claim or defence. This court will not, therefore, exercise any summary control over the proceedings. It is to be regarded as a mere arbitration, subject to the general law of arbitrament and awards. The entry of the submission in the book of common rules makes no difference. The motion of the defendant must be denied, with costs. (*Miller and another v. Vaughan*, 1 Johns. Rep 315. *Stevenson v. Beecker*, 1 Johns. Rep. 492.)

Where a cause is not referrible under the statute, it involving no matter of account between the parties, the court will not exercise any control over the proceedings, or interfere to set aside the report of the referees, though they may have admitted illegal or improper evidence; and the submission or rule of reference, has, by consent of the parties, after issue joined in the cause, been entered in the book of common rules.

Motion denied.

*RAWSON *against* ADAMS.

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IN ERROR, to the Court of Common Pleas of *Rensselaer* county.

Rawson sued *Adams* before a justice of the peace, and obtained a verdict and judgment for fifty dollars damages. On appeal, the cause was removed to the Common Pleas: and the justice returned, that the action before him was in *assumpsit* upon an order, in the following words: "Mr. *Rawson*, Sir, If Mr. *Simeon Smith* wishes to trade with you for some hides

A justice's return on a *certiorari* is conclusive evidence of the facts stated. But where a cause is removed from a justice's court by appeal, to a Court of Common Pleas, pursuant to the

'act to extend the jurisdiction of justices of the peace,' passed April 10, 1818, (sess. 41. ch. 94.) the return of the justice is conclusive only as to those particulars which, by the 18th section of the statute, he is required to return: to wit, "the title of the cause; the demands of the parties, the issue joined, the names of the witnesses, if any; the names of the jurors," &c. It cannot be received as evidence on the trial before a jury in the Court of Common Pleas, of any other facts. But where the justice, in his return, further stated, that the parties before him mutually admitted certain facts, which he specified; it was held, that these admissions might be considered as embraced in the words of the act requiring him to state "the demands of the parties and the issue joined;" and that the return, so far, was admissible evidence.

Where the defendant gave a written order on the plaintiff, in favor of *S.*, stating that *S.* wished to trade with the plaintiff for hides, to the amount of 80 or 100 dollars, and that the defendant would be responsible for the engagements of *S.*; and *S.* endorsed on the order a receipt for the hides, "to the amount of 100 dollars," &c.; held, that the receipt so endorsed was *prima facie* evidence of the delivery of the hides pursuant to the order.

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to the amount of 80 or 100 dollars, I will be answerable for his engagements. *February 10, 1814.*

JAMES ADAMS."

On the order, there was a receipt, in the words following "Received, *Lansinburgh*, 10th of *February*, 1814, of Mr *Keating Rawson*, hides to the amount of one hundred dollars, with interest from date, payable on the 1st of *October*, 1814. I hold myself, with *James Adams*, for this amount. 10th of *February*, 1814.

SIMEON SMITH."

The justice's return further stated, that "the parties then admitted before me the following facts: the defendant admitted the making of the writing by him, and the delivery of the hides, as specified in the receipt endorsed thereon; plaintiff admitted that *Simeon Smith* was then insolvent."

Upon the trial in the Common Pleas, the plaintiff offered in evidence the return of the justice, to prove the facts according to the above admissions. The counsel for the defendant objected, and upon the question, the court below were equally divided; and the plaintiff's counsel read the *return to the jury. The plaintiff's counsel then called *Harman Adams*, (a witness mentioned in the return,) who proved the signature of the defendant to the order, which was then read to the jury. The plaintiff's counsel then offered to prove, by the same witness, the signature of *Simeon Smith* to the receipt upon the back of the order, (as set forth in the return,) as evidence of the delivery of the hides; which evidence was objected to by the defendant's counsel, as incompetent to prove the delivery. Upon this question the court were also equally divided; and the receipt (being so proved) was read to the jury. The defendant's counsel then moved for a nonsuit; and it was granted, with costs.

The writ of error was brought to reverse the judgment of nonsuit.

The cause was submitted to the court without argument.

PLATT, J., delivered the opinion of the court.

The court below *erred* in granting a nonsuit. The receipt of *Simeon Smith* was undoubtedly competent evidence to prove the delivery of the hides to him, in compliance with the order of the defendant. He was, for that purpose, the agent of the defendant; and the receipt of the agent was the act of the principal. The order to *deliver* included an *authority to receive*. Proof of the signature of *Smith* to the receipt on the back of the order, ought, therefore, to have been allowed, as *prima facie* evidence of the delivery of the hides.

Whether the Court of Common Pleas also *erred*, in not excluding the justice's return, as to the admissions of the parties before him, is a question involving the construction of the late "act

(passed April 10, 1813,) to extend the jurisdiction of justices of the peace;" (sess. 41. ch. 94.) and calls for our exposition of that statute.

A return by a justice, on *certiorari*, is always to be received by this court as incontrovertibly true; and it is the only evidence which we can hear in affirming or reversing the judgment: but the object and design of removing the cause from the justice to the Common Pleas, on *appeal*, is entirely different. It is, in fact, *granting a new trial*, upon the same issue, in a higher court. The same witnesses *may be examined over again; and the parties are put to the proof of the facts upon the merits, as though there had been no previous trial before the justice. His return, therefore, is no evidence of facts to the jury, on an appeal.

By the 18th section of the "act to extend the jurisdiction of justices of the peace," the justice is directed, in case of appeal, to "make a return to the Court of Common Pleas of the proceedings before him, in which return it shall be the duty of the justice to state the title of the cause, the demands of the parties, the issue joined, the names of all the witnesses sworn and examined, and the names of any witnesses, if any were offered and rejected; the names of the jury, if the trial was by jury, and the verdict and judgment rendered in the cause."

From this, it seems that the justice's return was designed merely to give jurisdiction to the Common Pleas, under the statute, and was intended for the information and guidance of that court, and not as evidence to the jury. It was to enable the Court of Common Pleas, to confine the parties to the same issue; to prevent the admission of witnesses not offered in the court below; and to ascertain the jurors who had tried the cause before, so as to afford a certain ground of challenge. As to all these particulars, the justice's return is to be regarded as conclusive evidence to the Court of Common Pleas; but any other recital of facts in the return is impertinent and useless.

The 19th section of the act expressly declares, that the Court of Common Pleas "shall proceed and give judgment according as the very right of the case shall appear, without any regard to the previous trial had thereon."

But in this case, we incline to the opinion, that the admissions of the parties, as stated in the justice's return, may properly be considered as embraced in the words of the act, which require the justice to "*state the demands of the parties, and the issue joined*," &c.: and in that view alone was it proper to receive that part of the return as evidence in the Court of Common Pleas.

We are, therefore, of opinion, that the judgment of nonsuit ought to be reversed.

Judgment reversed.

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ALBANY,
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EGGLESTON

v.

SMILEY.

Where a cause was tried by a jury, before a justice, who was half uncle to the plaintiff's wife, the relationship was held too remote to disqualify him from acting.

The relationship, to amount to a disqualification, must be so near as to afford, of itself, evidence of partiality and fraud.

Though one of the jurors who tried the cause was related to the plaintiff, yet, if he was not challenged at the trial, the objection cannot be afterwards made; here appearing to be no unfairness in the trial.

*EGGLESTON against SMILEY.

IN ERROR, on *certiorari* to a Justice's Court.

Smiley sued *Eggleston* in the court below, and recovered a judgment against him. The justice, and one of the jurors who tried the cause, were half uncles of the plaintiff's wife; and the only questions, on the return to the *certiorari*, were, whether the justice, on account of his relationship to the plaintiff, was disqualified to act as judge in the cause; and whether the juror, who was not challenged at the trial, was not subject to the same exception.

Per Curiam. There is nothing in the return that affords the least color for any pretence of unfairness or injustice in the proceedings before the justice.

In the case of *Pierce v. Sheldon*, (13 *Johns. Rep.* 191.) the justice was the father-in-law of the plaintiff; and the court said, it was, perhaps, questionable, whether he was not, on the ground of that relationship, disqualified to try the cause. It was remarked, that "the gross indecency of an exercise of his judicial power in such a case would induce the court to scrutinize his proceedings with a jealous eye." In that case, the cause was tried by the justice, alone, who gave judgment in favor of his son-in-law. In the present case, there was a trial by jury. Besides, the affinity was very remote. We think the objection to the justice is not well founded. To disqualify him from trying a cause, the relationship must be so near, as to amount, of itself, to evidence of partiality and fraud. The objection to the juror, even if it had been sufficient at the trial, is now too late to be made here. The judgment ought, therefore, to be affirmed.

Judgment affirmed.

ALBANY,
October, 1819.

*BEEKMAN, survivor of WALSH, against E. HALE.

BEEKMAN
v.
HALE.

THIS was an action of *assumpsit*, tried at the *Albany* circuit, in *October*, 1818, before Mr. Justice *Spencer*.

The first count in the declaration stated, that the plaintiff and *Walsh* were partners in trade, in *October*, 1815, under the firm of *Dudley Walsh & Co.*, and that *Joshua Lovejoy* and *James Hale* were also partners in trade, under the firm of *Lovejoy & Hale*, and were indebted to *D. W. & Co.*, in the sum of 1,234 dollars and 8 cents; that, in consideration of the premises, and that *D. W. & Co.*, at the special instance and request of the defendant, would forbear, and give time to the said *L. & J.*, for the payment of the said sum of money, as much as they, the said *D. W. & Co.*, should agree with the said *James Hale*, he, the defendant, then and there, undertook, and faithfully promised the said *D. W. & Co.*, to pay to them the said sum of money, &c.; and the plaintiffs averred, that, confiding in the said promise, &c., they did agree with the said *James Hale* to forbear, and give time of payment to the said *L. & J.*, until the 1st day of *October*, 1816, and did actually forbear, and give time to the said *L. & H.*, until the 1st of *October*, 1816, and of which the defendant had notice, &c., and thereby became liable. The second count stated, that the plaintiffs and *D. W.* being partners, &c., and *L. & H.* being indebted to them, in the sum of, &c., in consideration that the said *D. W. & Co.* would forbear, and give time to the said *L. & H.* until the 1st of *October*, 1816, the defendant undertook and promised to pay the said *D. W. & Co.* the said sum of money, on the 1st day of *October*, 1816; and averred, that the plaintiff and his partner, confiding in the said promise, &c., did forbear, and give time *to the said *L. & H.*, until the 1st of *October*, 1816, of which the defendant had notice, and, according to the tenor and effect of his promise and undertaking, became liable to pay, &c. The third counts was similar to the second, omitting only the name of *Lovejoy*, throughout. The declaration, also, contained counts for goods sold and delivered, and the usual money counts.

At the trial, the following letter was given in evidence: "*Albany*, 3d of *October*, 1815.—Dear Sir, my brother wishing me to call on you, I am sorry I could not have seen you about the demand you have against *James* and *Lovejoy*. You will get judgment against *James*; as it is hard for *James* to pay it from his own pocket, I wish you to show him some lenity, as

The defendant, on the 3d of *October*, 1815, wrote to the plaintiff, to whom *J. H.* and his partner *L.* were indebted, as follows; "You will get judgment against *J.*; as it is hard for *J.* to pay it from his own pocket, I wish you to show him some lenity, as much as you think proper, for the collection of it from *L.* and I will, if you please, stand responsible for the payment of it at the time you and *J.* may agree on." On the same day, the balance due the plaintiff from *J. H. & L.*, was liquidated, and *J. H.* gave his note to the plaintiff for the balance, payable with interest, on the 1st of *October*,

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1816. A suit was commenced by the plaintiff on this note, and judgment recovered against *J. H.* in *October*, 1817, and the execution issued thereon returned *nulla bona*. But it did not appear, that any notice had been given to the defendant, that he was considered as guaranty, or of the non-payment of

the debt by *J. H.*, until *January*, 1818. Held, that the defendant's letter to the plaintiff, was not an absolute guaranty; but an offer or proposition to become guaranty, if the plaintiff would forbear, and give *J. H.* time for payment; and that the defendant ought, therefore, to have had notice from the plaintiff that he accepted the guaranty; and, no such notice being given, until more than two years after the defendant's letter was written, and when *J. H.* and his partner had become insolvent, it was held that the defendant was not liable.

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much as you think proper, for the collection of it from Mr. *Lovejoy*, and I will, if you please, stand responsible for the payment of it, at the time you and *James* may agree on. Yours, &c. *E. Hale*." "To *Dudley Walsh, Esq.*" It was admitted, that *Joshua Lovejoy* and *James Hale* were partners at the time, and before, and since.

A clerk of *D. W. & Co.* testified, that on the 3d of *October*, 1815, a note was taken by *D. W. & Co.* for the balance of account then due to them from *L. & H.*, which note was as follows: "On the first day of *October* next, we promise to pay to the order of *Dudley Walsh & Co.*, twelve hundred and thirty-four dollars and eight cents, with interest, value received. *Albany*, 3d of *October*, 1815, as witness my hand and seal, *James Hale & Co. (L. S.) \$1,234 7/8*. Witness, *D. Winne*." That the time of payment was extended in consequence of the written assumption of some third person to see the debt paid, but who such person was the witness did not know.

The following letter from the defendant was given in evidence: "Dear Sir, Mr. *Elijah Risley*, of *Fredonia*, county of *Chataugue*, who is a partner of *James Hale*, wrote me that he would secure the demand in favor of *D. Walsh & Co.*, against *James Hale*, to be paid in a reasonable time. If you can send the demand to some person in *Fredonia*, to settle, I have no doubt but good land security may be had from Mr. *Risley*, for the payment of this debt. Under all circumstances, probably, this would be the best arrangement *that could be made, and believe Mr. *Beekman* would have no objections to such an arrangement, as it appears to be a reasonable one, particularly as things are situated. *Canandaigua*, 10th of *February*, 1818. Yours, respectfully, *E. Hale*." To "*Abraham Van Vechten, Esq., Albany*." It was proved that this letter was received by Mr. *Van Vechten*, in answer to one written to the defendant on the 21st of *January*, 1818, as follows: "Sir, an execution has been issued to the sheriff of *Niagara*, upon a judgment obtained against your brother *James*, in favor of *H. Beekman*, survivor of *D. Walsh & Co.*, for a demand which you have *guarantied* the payment of. The sheriff informs me that your brother has no property, and I have understood that he has conveyed property to you to cover the above amongst other debts. It is the wish of Mr. *Beekman* to close the business of *D. Walsh & Co.* without delay. With that view, I am directed to require payment on your guaranty. Will you write me when you can do it? *Albany*, *January* 26, 1818. *Abraham Van Vechten*." "To Mr. *E. Hale, Canandaigua, Ontario county*." A witness for the plaintiff testified, that in *September*, 1818, he had a conversation with the defendant, in relation to the above suit, in which the defendant stated, that he supposed *Dudley Walsh*, deceased, had indulged his, the defendant's, brother, *James Hale*, in the payment of a debt he owed to *D. Walsh & Co.*, in consequence of a letter which he, the

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defendant, had written to the said *D. W.*, in the beginning of *October*, 1815; and the defendant said, that he was sorry that *Mr. Beckman* had not called on his, the defendant's, brother sooner, or notified him, the defendant, that the debt was not paid, or words to that effect; and that now he, the defendant, would have to lose it, if the plaintiff recovered against him, as his brother was considered as worth nothing. The plaintiff gave in evidence the record of a judgment, filed the 23d of *October*, 1817, in favor of the plaintiff, against *James Hale*, for 1411 dollars and 56 cents damages, and 67 dollars and 1 cent costs, from which it appeared, that the suit was brought and judgment recovered upon the sealed note, above mentioned, and the *capias* was returned in *May*, 1817. A *fiery facias*, tested the 24th of *October*, 1817, was *issued on the said judgment, directed to the sheriff of *Niagara*, and which was returned in *January* following, *nulla bona*.

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A verdict was taken, by consent, for the plaintiff, for 1,565 dollars and 4 cents, the amount of the debt with the interest and costs of the judgment against *James Hale*, subject to the opinion of the court, on a case containing the facts above stated.

Loucks, for the plaintiff, contended, that the defendant's letter of the 3d of *October*, 1815, was an actual and valid agreement in writing, to be responsible for his brother's debt. The consideration of forbearance was expressed in the letter. The defendant, moreover, has admitted his guaranty, and the forbearance shown to his brother, and acknowledged his liability for the debt. The case of *Leonard v. Giddings*, (9 *Johns. Rep.* 355.) and *The People v. Berner and others*, (13 *Johns. Rep.* 383.) show the principles on which this action is maintainable. The case of *Kip v. Brigham*, (7 *Johns Rep.* 168.) shows that the plaintiff was entitled to recover the costs of the judgment against *James Hale*, in addition to the original debt and interest.

Parker, contra, insisted, 1. That the evidence did not support any of the counts in the declaration. Where a promise is executory, the whole consideration must be stated, and with great precision and certainty. (1 *Chitty Pl.* 297. 2 *Bos. & Pull.* 116. 120. *Cro. Eliz.* 79. 6 *East Rep.* 568. *Buller's N. P.* 147.) Where there is a collateral undertaking for another, subsequent to the original debt, some further consideration must be shown. (*Leonard v. Vredenburg*, 8 *Johns. Rep.* 29. 39.) Here the forbearance was to *J. H.*, not to *L. & H.* It was not a concurrent promise; where one promise is the consideration of another, they must be concurrent as to time. (12 *Johns. Rep.* 190. 391.)

Again; the promise was not absolute, but conditional. It was a proposition to the plaintiff.

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2. If the plaintiff accepted the promise, he ought to show that he has used due diligence to obtain the money from *J. H. He ought, also, to have given seasonable notice to the defendant, of the non-payment by J. H. (2 *Johns. Cases*, 410. 3 *Johns. Rep.* 230. 234. '7 *Johns. Rep.* 340. 10 *Johns. Rep.* 587. 4 *Vesey*, jun. 833.)

Van Vechten, in reply, said, that the declaration was in conformity to the defendant's undertaking. The third count omitted the name of *Lovejoy*. One or other of the counts must be sufficient. No notice of the non-payment of the debt was necessary; (1 *Saund.* 116.) but if it was, a sufficient notice has been shown.

SPENCER, Ch. J., delivered the opinion of the court. I do not perceive how this case can be distinguished from that of *Stafford and others v. Low*, (16 *Johns. Rep.* 67.) The alleged guaranty here is, "I wish you to show him (*James Hale*) some lenity, as much as you think proper, for the collection of it from Mr. *Lovejoy*, and I will, if you please, stand responsible for the payment, at the time you and *James* may agree on." The letter from which this extract is taken bears date the 3d of *October*, 1815, at which time J. H. & J. L. were partners in trade. The letter is directed to *Dudley Walsh*, then a partner with the plaintiff. The declaration states that, when this letter was written by the defendant, L. & H. were then indebted to the firm of B. & W. 1,234 dollars and 8 cents, the sum sought to be recovered; and the consideration of the defendant's promise is a forbearance, and giving time to L. & H., for the payment of their debt, at the defendant's instance and request, until the 1st of *October*, 1816, and it avers that the defendant had notice thereof. It appears, that on the 3d of *October*, 1815, the date of the defendant's letter, a sealed note was given by *Hale* or *Lovejoy* for the balance due the plaintiffs, payable the first of *October* thereafter, in consequence, I admit, of the defendant's letter. It appears, that in *September* preceding the trial, the defendant said, he supposed Mr. *Walsh* had indulged his brother *James*, in the payment of a debt he owed W. & B. in consequence of a letter he had written *Walsh* in the beginning of *October*, 1815; that he was sorry that Mr. *Beekman* had not called on his brother sooner, or *notified him that the debt was not paid; and that now he would have to lose it, if the plaintiff recovered, as his brother was considered worth nothing. There is no proof in the cause, that the defendant was ever informed, until *January*, 1818, that the plaintiff, or his deceased partner, considered him a guaranty, or that he had notice, that the payment of the debt due from L. & H. to the plaintiff, had been extended, in consequence of the letter he had written. The question is, whether the defendant's letter is an absolute guaranty, or an overture and

proposition leading to a guaranty. If it be the latter, then he was entitled to notice from the plaintiff, that it was accepted and regarded as a guaranty, and that the payment of the debt had been prolonged in consequence of it. In the case of *Staf-ford and others v. Low*, the letter from the defendant stated "and if, in addition to the foregoing explanation, you shall require my individual guaranty, I shall have no objection to give you that pledge." We held, that the defendant's engagement was conditional, dependent on the plaintiffs being dissatisfied with the security they then had; and as they never manifested to the defendant their dissatisfaction with that security, the inference was, that they were satisfied, and did not mean to avail themselves of the defendant's conditional offer. We refer to and adopt the principles of the case of *M'Iver v. Richardson*, (1 *Maule & Selw.* 557.) that such a conditional offer of guaranty was a proposition only, leading to a guaranty, and that the defendant ought to have had notice that it was so regarded, and was meant to be so accepted, or there should have been a subsequent consent to convert it into a conclusive guaranty. It cannot be pretended, it seems to me, that the defendant's proposition amounted to an absolute, unconditional guaranty; for it was contingent, whether the plaintiffs would show the defendant's brother lenity, by extending the payment; and the debt being then already contracted and due, there would have been no consideration for the defendant's engagement, unless there had been a forbearance. It was a matter of uncertainty, also, whether the plaintiffs required additional security. The defendant was entitled to know, and that, too, from the plaintiffs, that they not only had given *L. & H.* an extension of credit, but that *it had been done on the faith of his offer, and that they regarded him as guaranty. If it once be admitted, that the defendant's offer was conditional, and dependent on the plaintiff's willingness to give *L. & H.* further time, and to accept the defendant as guaranty, and his letter as the cause of the extension of the credit, the consequence irresistibly follows, that he was entitled to be informed, within a reasonable period, of these occurrences. Were the contrary doctrine to prevail, the most unjust results would follow; the individual offering to become a guaranty would have a right to believe that his offer had not been accepted; he would be completely thrown off his guard, and at a distant period, when an insolvency of the principal debtor had intervened, and all hopes of indemnity were gone, he would find himself unexpectedly called on to pay a debt which he never knew that he was liable for. Good faith, and the very nature of the negotiation, alike require it of the party acting on and accepting a proffered guaranty, to apprise the other party of what is done, and what his liabilities may be. In the case of *Russell v. Clark's Executors*, (7 *Cranch*, 91.) Chief Justice *Marshall*, in delivering the opinion of the court, after

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deciding, that certain letters, written by *Clark & Nightingale*, did not constitute a contract by which they undertook to render themselves liable for the engagement of *Murray & Co.* to *N. Russell*, observes—"had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendant of the extent of his engagements."

It would be vain to say, that *James Hale* was the defendant's agent, and that he was bound to give the requisite notice. There was no evidence of the fact, that he was such agent. It certainly does not result from the defendant's consent to become a guaranty, and there is nothing else to found the suggestion upon. After the insolvency of *Lovejoy* and *Hale*, and after the lapse of nearly three years, in all which time, for aught that appears, the defendant remained in ignorance, whether his proposition had been acceded to by the plaintiffs, it is impossible to consider him liable.

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*PLATT, J., (dissenting.) I incline to the opinion that, so far as regards the debt and interest, the plaintiff is entitled to recover.

The letter of the defendant contains a promise to "stand responsible" for the payment of the debt, at such time as his brother *James* and *Mr. Walsh* should agree on. *Mr. Walsh* did agree with his brother *James* to extend the credit for about a year; and *James Hale* gave the note accordingly. This extension of credit appears to have been given in consequence of, and in reliance upon, the letter of the defendant. The forbearance to sue is a valid consideration; and that consideration is expressed in the letter.

The words "*if you please*," before the words "I will stand responsible," are mere *expletives*, and do not vary the legal import of the letter.

The contract of guaranty was consummated as soon as *Mr. Walsh* was pleased to accept the offer, and to act upon the faith of it; as the evidence clearly shows that he did.

It was like a letter of credit; and as if he had written, "let my brother have goods, as you and he shall agree, and I will stand responsible, *if you please*."

In neither case is it incumbent on the party receiving such guaranty to give notice that he has complied with the request. The law implies a privity and confidence between the surety and his principal; and the surety is bound to inquire, at his peril, whether the principal has contracted upon his credit, and to what extent.

In regard to the costs of the suits against *James Hale*, the plaintiff is not entitled to recover. That proceeding was altogether voluntary on the part of the plaintiff; he was not bound to sue the principal, in order to charge the surety. The guaranty was for the debt and interest only.

I am, therefore, of opinion, that the plaintiff is entitled to judgment for the amount of the sealed note and interest. (a)

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Judgment for the defendant.

(a) *Ante*, page 114, note. 16 *Johns. Rep.* 69, 70, notes.

*COVENTRY *against* BARTON.

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THIS was an action of *assumpsit*, tried at the *Columbia circuit*, in *November*, 1818, before Mr. Justice Yates.

The defendant was, in 1812, *overseer of highways*, and the plaintiff was assessed to work on the highways within the defendant's district, and when working with others, on the road, under the direction of the defendant, they came to a turnpike gate placed at the intersection of the *Rensselaer road* with the *Farmer's turnpike road*. The *commissioner of highways*, who was also present, ordered the defendant to set his men to work and take away the gate; upon which the defendant ordered the plaintiff, among others, to take the gate away, and, accordingly, the plaintiff and others removed the gate; while the plaintiff was at work at removing part of the fence to which the gate was attached, the defendant directed him how to proceed, and said, "I will bear thee out in it." One of the witnesses testified, that the defendant ordered the plaintiff and the others to remove the gate, and said, that "he would see them out in it, or that he would indemnify them." Several actions of trespass were brought by the *Farmer's Turnpike Company* against the individuals engaged in removing the gate and fence, and among others, the plaintiff, against whom a judgment was recovered in *November*, 1813, for 215 dollars and 3 cents damages, the amount of which judgment had been paid by the plaintiff; and to recover that amount the present suit was brought against the defendant, on his promise to indemnify the plaintiff. It was proved, that the defendant was present when the action brought by the turnpike company against the plaintiff was tried, and that he knew of the suit.

*On the evidence of the facts above stated, the judge ordered the plaintiff to be nonsuited.

A motion was made to set aside the nonsuit, and for a new trial, which was submitted to the court without argument.

supposing it to be a nuisance, and the plaintiff, accordingly, removed the gate and fence, on the promise of the *overseer* to indemnify him; this was held to be a valid promise, on which the plaintiff might maintain an action to recover of the defendant an indemnity, for what he had been compelled to pay on a judgment in an action of trespass recovered against him, by the turnpike company whose gate had been so removed.

If a consideration be illegal, it will not support an *assumpsit*. As if one request or direct another to do an act which he knows, at the time, will be a trespass, and promise to indemnify him, the promise is void; but if the party who does the act at the instance or by the command of another does not know, at the time, that he is committing a trespass, the promise to indemnify is valid. As, where the plaintiff, being ordered out by the *overseer of highways* of work on a certain road, was ordered by the *overseer of the highways*, and by the direction, also, of the *commissioner of highways*, to pull down and remove a turnpike gate and fence, erected

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at the intersection of the road, on which the parties were working, with a turnpike road,

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SPENCER, Ch. J., delivered the opinion of the court. The plaintiff cannot pretend to claim on the ground of contribution, for it is well settled that, as between trespassers, there can be no contribution. In such case, the law will not imply a promise. It is a general and well established principle, that, if the consideration be illegal, it will not uphold an *assumpsit*: as in the case put in the books: the defendant, in consideration of 20 shillings, assumed to pay 40 shillings if he did not beat J. S. out of such a close. The common law prohibits every thing unjust, or *contra bonos mores*, and a contract contravening these principles is void. But if one person request another to enter into B.'s land, and, in his name, to drive out the beasts, and impound them, and promise to save him harmless, this is a good *assumpsit*, though the act is tortious. (*Winch.* 49. 1 *Com. on Con.* 31.) In *Allaire v. Ouland*, (2 *Johns. Cas.* 54.) where the plaintiff was the servant of the defendant, and had been commanded by him to enter into the *locus in quo*, claiming it, and declaring it to be his own, and promising to indemnify the plaintiff, the court say, if this had been true, the entry would have been lawful; the plaintiff, relying on the truth of the defendant's declarations, did enter; the act on his part was, therefore, lawful, and a good consideration for the promise. And where a promise was made to an innkeeper, that if he would keep one B., (whom the defendant pretended to have arrested on a commission of rebellion,) for one night, in his inn, as a prisoner, he would save the plaintiff harmless, judgment was given for the plaintiff, who had been sued for a false imprisonment, and a recovery had against him. The court say, that, whether B. was arrested lawfully or not, the illegality thereof did not appear to the plaintiff. (1 *Vin. Abr.* 299. pl. 27.) But if the act directed to be done appears to be unlawful, then the agreement will be unlawful and void. (*Buller, N. P.* 146.)

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*I have no hesitation in saying, that it is a true and just distinction between promises of indemnity which are, and those which are not, void; that if the act directed or agreed to be done, is known, at the time, to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise. (*Coup.* 343.)

I am strongly inclined to the opinion, that the plaintiff has brought himself within the latter distinction. The question upon the argument of the case of *The Farmer's Turnpike v. Coventry*, (10 *Johns. Rep.* 389.) turned upon the right to erect this gate where it was put; the defendant's counsel contending, that the gate could not be set up within three miles, at least, of the compact parts of the city of *Hudson*, as defined by a map confirmed by the act of 1807. We decided against that construction; but there was, at least, color for the ground taken. Again, *Hardick*, who was a commissioner of highways,

directed the defendant to set his men to work, and take the gate away, upon which the defendant ordered it to be done. Here, then, is the case of the commissioner and overseer of highways both agreeing in considering the gate as a nuisance, and both directing it to be removed. The plaintiff was acting in a subordinate capacity. He perceived a gate standing directly across an old road, and his superiors, whom he had a right to think well informed, pronouncing it, in effect, to be a nuisance. I think the conclusion inevitable, that the plaintiff did not know, at the time, that the act he was doing was a trespass; and then the promise of indemnity is valid.

There must be a new trial, with costs to abide the event of the suit.

New trial granted.

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***BUTLER against POTTER.**

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IN ERROR, to the Court of Common Pleas of *Onondaga* county.

The plaintiff below brought an action of trespass, assault and battery, and false imprisonment, against the defendant below, who pleaded the general issue, with notice of justification, to wit, that the plaintiff and one *Tappin*, on the 26th of *June*, 1817, confessed a judgment before the defendant, as a justice of the peace, under the act for the recovery of debts to the value of 25 dollars, upon which judgment execution was issued in favor of the plaintiff in that suit; and by virtue of which execution, the constable to whom it was directed, committed the plaintiff to gaol, which was the same trespass, assault, &c., mentioned in the plaintiff's declaration, &c.

On the trial of the cause in the court below, the execution issued by the defendant, as justice of the peace, against the plaintiff and *Tappin*, was produced in evidence, from which it appeared that the judgment was rendered for sixteen dollars damages, and *five dollars and eighteen cents costs*; and the plaintiff proved that he was committed to gaol on the execution.

The counsel for the plaintiff below then objected, that inasmuch as it appeared, by the judgment and execution, that the *costs* were more than *five dollars*, it was contrary to the provision of the 26th section of the 25 dollar act; and the execution was, therefore, void, and no justification to the defendant. The court below decided that the execution was void, and directed the jury to find a verdict for the plaintiff; and the jury, accordingly, found a verdict for *Potter*, the plaintiff below, against *Butler*, for 25 dollars and 50 cents damages;

pass &c., and false imprisonment, at the suit of the defendant, who had been imprisoned under the execution issued on the judgment.

Where a justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice* and void; but if he has jurisdiction, and errs in the exercise of it, his acts are voidable only. As where a justice of the peace, in a cause before him, and of which he had legal cognizance, gave judgment for the plaintiff, for more than five dollars costs, besides damages, contrary to the statute, which limits the whole amount of costs to be recovered, to the sum of five dollars, the judgment and execution thereon were held to be voidable only; and that, therefore, the justice was not liable in an action of tres-

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and the defendant below tendered a bill of exceptions to the opinion of the court, on which the writ of error was brought.

The cause, on the return to the writ of error, was submitted to the court without argument.

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**Per Curiam.* The justice had jurisdiction to give judgment for costs; and though he was limited as to the amount, and gave judgment for more than he ought, it was an erroneous, not a void judgment. The case of *Prigg v. Adams*, (2 Salk. 674.) is in point. There, an action of trespass and false imprisonment was brought, and the defendant justified under a *ca. sa.*, on a judgment in the Common Pleas, for five shillings, on a cause of action arising in *Bristol*. The plaintiff replied, setting out an act of parliament for erecting a court of conscience in *Bristol*, enacting, that if any person bring such action in any of the courts at *Westminster*, and it appeared, on trial, to be under *forty shillings*, that no judgment should be entered for the plaintiff; and if it be entered, then, that it should be void. The court held the judgment voidable only, by plea or writ of error. We have decided, that where a justice has jurisdiction to issue an attachment, but proceeds erroneously in doing so, he is not, therefore, a trespasser. The distinction is this: where the justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*; but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only.

Judgment reversed.

JACKSON, *ex dem.* CRAIGIE, against WILKINSON.

Where, in a grant, there is a known and well ascertained place of beginning, that must govern, and the grant is to be confined to lands comprised within the boundaries given in the deed.

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THIS was an action of ejectment, tried at the *Genesee* circuit, in *June*, 1818, before the late chief justice, when a **verdict* was taken for the defendant, subject to the opinion of the court on a case; and it was agreed between the attorneys of the parties, that if the court should be of opinion that the plaintiff ought to recover, that the *postea* should be made up accordingly, and a judgment be entered thereon for him; otherwise, judgment was to be entered for the defendant.

The case stated, that *Robert Morris* was the common source

Where the premises conveyed in a deed from *M.* to *C.*, were described as follows: "to be admeasured according to the following bounds and lines, to wit, beginning at the south-west corner of a tract of land of, &c., granted to *W.* and others, &c.; thence, extending east, along the southern boundary of the said tract, *six miles*; thence southerly, so far as by lines drawn from those two points, parallel to the eastern and western boundaries of the said tract of *W.*, &c. will include 33,750 acres of land?" And, by a prior grant from *M.* to others, he had cut off *two miles* of his land east from the south-west corner of the tract mentioned, so as to narrow the base to *four miles*: Held, that the line could not be extended so far south, upon other land granted by *M.* to *O.*, so as to give the quantity of acres intended to be conveyed; though the deed to *O.* described the premises thereby granted, as "beginning at the south-west corner of a certain tract of land of 33,750 acres, granted, or to be granted, by *M.* to *C.*"

of title to both parties. On the 6th of *April*, 1797, *Robert Morris*, and his wife, executed a deed to the lessor of the plaintiff, reciting a certain agreement, dated the 5th of *August*, 1795, between the parties, whereby *R. M.*, in consideration of five shillings, and of the further sum of 12,234*l.* 7*s.* 6*d.* lawful money of the state of *New-York*, to be paid by the said *A. C.*, covenanted to convey to *A. C.*, free from all incumbrances, on or before the 1st of *January*, 1796, the tract of land afterwards described, &c. That, *A. C.* having fulfilled his part of the agreement, &c., therefore, the said *R. M.*, in consideration of 12,234*l.* 7*s.* 6*d.* lawful money of the state of *New-York*, &c., granted, bargained, sold, &c. to the said *A. C.*, his heirs and assigns, "all that tract, piece, or parcel of land, situate, lying, and being in *Ontario* county, in the state of *New-York*, being part of the lands ceded by the state of *New-York* to the state of *Massachusetts*, and which, by divers legislative acts of the state of *Massachusetts*, and divers good conveyances, and assurances duly had, made and executed under the said acts, are now vested in the said *Robert Morris*, and to be admeasured according to the following bounds and lines, to wit: Beginning at a south-west corner of a certain tract of land of one hundred thousand acres, granted to the said *Andrew Craigie*, *James Watson* and *James Greenleaf*, by indenture dated the 18th of *February*, 1792; thence extending east, along the southern boundary of the said tract, six miles; thence southerly, so far as by lines drawn from those two points, parallel to the eastern and western boundaries of the said one hundred thousand acre tract, will include the quantity of thirty-three thousand, seven hundred and fifty acres of land;" (except out of the said lines any part of the land known by the name of the *Genesee* flats;) to have and to hold, &c. The *deed contained covenants of seisin, warranty, and for further assurance, &c. The plaintiff, also, gave in evidence a deed from *Robert Morris* and his wife, to *Herman Le Roy*, *John Linklan*, and *Gerrit Boon*, dated 27th of *February*, 1793, for one million of acres of land. The eastern boundary of this tract, called the *transit line*, was proved to run over and include two miles in width of the western part of the tract conveyed to the lessor of the plaintiff, by which a deficiency is produced in the quantity intended to be granted to him, by the first mentioned deed, of 11,694 acres. The plaintiff further gave in evidence a deed from *Robert Morris* and his wife, to *Watson*, *Craigie* and *Greenleaf*, dated the 8th of *February*, 1792, which tract is the one referred to in the description of the premises conveyed to the lessor of the plaintiff, and the southern boundary of which is the north line of the tract of the lessor of the plaintiff.

A deed was also produced in evidence, from *R. M.* and his wife to *Herman Le Roy* and *William Bayard*, executed the 11th day of *January*, 1793, for the tract, called the triangle, the west boundary of which was proved to be six miles east of the south-

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west corner of the tract of *Watson, Craigie and Greenleaf*, and four miles east of the north-west corner of the tract belonging to the lessor of the plaintiff, as now held by him, and to extend southerly about half way along the eastern line of the last mentioned tract. The plaintiff's counsel alleged, that the other half of the eastern line of the tract of the lessor of the plaintiff was equally hemmed in by prior conveyances, so as to prevent its extension eastward; and, to show that fact, gave in evidence certain mortgages from *R. M.* to *Le Roy* and others, dated the 28th of *December*, 1796, and the 31st of *December*, 1796, in pursuance of certain articles of agreement made the 28th of *December*, 1792, and the 20th of *July*, 1793, and a decree of the Court of Chancery, of the 4th of *April*, 1805. And it was alleged by the plaintiff's counsel, that by reason of these conveyances and proceedings, *R. M.*, at the time of the agreement to sell and convey to the lessor of the plaintiff, on the 1st of *August*, 1795, and at the time of the execution of the deed, pursuant to that agreement, on the 6th of *April*, 1797, was not seised of any lands on the eastern side *of the tract of the lessor of the plaintiff, by which the deficiency in the quantity intended to be conveyed to him could be supplied; and that, therefore, he was entitled to extend the lines so far south, on land owned by *R. M.*, at the time of the contract and conveyance to the lessor of the plaintiff, as would make up the quantity.

The defendant gave in evidence a deed from *R. M.* to *Samuel Ogden*, dated the 1st of *May*, 1796, of a tract of land described as follows: "All that tract, piece, or parcel of land, situate, &c., and now vested in the said *R. M.*, to be admeasured according to the following boundaries, to wit, *beginning at the south-west corner of a certain tract of land of thirty-three thousand seven hundred and fifty acres, granted, or to be granted, by the said R. M. to Andrew Craigie*; thence extending east, along the southern boundary of the said tract, six miles; thence southwardly, so far as, by lines to be run from those two points, parallel to the eastern and western boundaries of the said thirty-three thousand seven hundred and fifty acre grant, will include the quantity therein of fifty thousand acres; except out of the said lines any part of the land known by the name of the *Genesee flats*."

It was admitted, that if the lessor of the plaintiff is entitled to run *south* upon the tract conveyed to *Samuel Ogden*, in order to obtain the eleven thousand six hundred and ninety-four acres which is deficient, he will cover and include the premises in question, for which this action is brought. It was also admitted, that the defendant held under a regular conveyance from *Samuel Ogden*.

In order to show that *R. M.*, at the time of his grant to *Samuel Ogden*, was seised of lands immediately south of the tract conveyed to *Ogden*, from which *Ogden's* quantity of 50,000

acres might be supplied, if any deficiency was produced therein by the recovery of the plaintiff in this suit, the plaintiff gave in evidence a deed from *R. M.* to *Garritt Cottringer*, dated the 3d of *May*, 1796, for a tract of land "to be admeasured according to the following bounds and lines, to wit, beginning at the south-west corner of a certain tract of land of 50,000 acres, granted by the said *R. M.* to *Samuel Ogden*; thence, extending east along the southern boundary of the said tract, six miles; thence south with the *breadth of six miles, between lines to be run from the two extreme points of the aforesaid line, in a direction to form right lines with the east and west boundaries of the said fifty thousand acre tract, so far as that a line drawn from the points of intersection of the lines so to be run, will include within the said four lines, fifty thousand acres." In the margin of which deed was a diagram, exhibiting the situation of the tracts as intended to be granted by *R. M.*

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Henry, for the plaintiff, 1. As to the legal construction of the deed from *Morris* to *Craigie*, as between themselves: The exact situation and dimensions of the tract of land owned by *Morris*, on account of the wild state of that part of the country, were not known to the parties at the time. This is a circumstance which ought to be kept in view, in the construction of the grant.

All the authorities agree, that such a construction is to be given, as will carry the deed into effect according to the intent of the parties. In all contracts or deeds, the construction is to be favorable, and as near to the minds and apparent intention of the parties as may be. (*Shep. T.* 83. pl. 14. *Plowd.* 154. 160.) Every deed shall enure, as much as may be, according to the intention of the parties. (*Finch's Law*, 58.) Every agreement must have a reasonable construction which may be consistent with the intent of the parties. (2 *Vent.* 278.) The matter and substance of every grant being nothing but a declaration of the owner's will to transfer a thing to another; if, by any words, his intention appears to pass the thing, a slight mistake or error in the description will not vitiate the grant. (*Hob.* 229. 3 *Bac. Abr.* 386. 393. *Grants*, (1.) 2 *Roll. Abr.* 56.) The law will not so construe an act as to work a wrong. (*Co. Litt.* 36. a. 42. a. 114. a. 183. b. 3 *Atk.* 136. 5 *Vin. Abr.* 510. pl. 10. 1 *Term Rep.* 701. *Cowp.* 714. 4 *Cruise's Dig.* tit. 32. ch. 23. s. 38. 7 *Term Rep.* 714.) Such, also, is the rule of the civil law; *In conventionibus contrahentium voluntas potius quam verba spectari placuit.* (*Dig. Lib.* 50. l. 219. *Poth. Trait. des Oblig.* n. 91.) A particular in the description of land conveyed, manifestly inconsistent with the intention of the parties, may be rejected, if, without such *particular, the land intended to be conveyed can be sufficiently ascertained. (*Shep. Touchst.* 247, 248. *Cro. Car.* 447. 473. *Hob.* 171. 272. *Dyer*, 80. 5 *East*, 51.)

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The case of *Massie v. Watts*, (6 *Cranch's Rep.* 148.) supports this principle of construction. The Supreme Court of the *United States*, in that case, in order to give effect to the intention of the party, adopted a construction of the words of description, which his misapprehension of the true course of the *Scioto* river rendered necessary to circumscribe the land, by running *five* lines, instead of *four*. Chief Justice *Marshall* says, that "if by any reasonable construction of an *entry*, it can be supported, the court will support it." "If the *calls* (a) of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of certain principles, they will complete it." "That, if a location have certain material calls sufficient to support it, and to describe the land, other calls, less material and incompatible with the essential *calls* of the entry, may be discarded." (6 *Cranch*, 165.) In *Jackson, ex dem. Rogers, v. Clark*, (7 *Johns. Rep.* 217.) *Spencer, J.*, in delivering the opinion of the court, says, "such construction is to be given as will give effect to the intention of the parties, if the words they employ will admit of it; *ut res magis valeat quam pereat*. If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." (Vide, also, *Worthington v. Hyler*, 4 *Mass. Rep.* 196. 205. *Jackson v. Myers*, 388. 395. 2 *Caines's Rep.* 367. 3 *Caines's Rep.* 13. S. C. 1 *Johns. Rep.* 158.) Now, to apply these principles to the present case, what are the material or essential *calls* in this case?

A tract of land in *Ontario* county, being part of lands, &c. now vested in *Robert Morris*: It is to be admeasured from a base which forms the southern boundary of a tract of 100,000 acres, granted by *M.* to *W. C.* and *G.*: It is to extend southerly so far as, by lines to be drawn from the base, parallel to the eastern and western boundaries of the 100,000 acre tract will include 33,750 acres of land. Quantity; *then, is the object, not precise and definite lines. The base is given, and the grant is to be so extended by lines, as to include the quantity. As between the grantor and grantee, the former having by a prior grant cut off two miles west, the latter is entitled to extend it two miles farther east, to give the base of six miles so as to include the quantity. Parcel or not, is matter of description and matter of fact. The quantity of 33,750 acres of land the lessor of the plaintiff was to have, by the grant to him; and, as between the parties to the deed, it is clear, that if, by the prior deeds of the grantor, the lines could not extend west or east, they might be extended south, on the land then belonging to the grantor, so as to include the quantity intended to be conveyed.

(a) Vide *M'Iver's Lessee v. Walker*, (9 *Cranch*, 173.) *Johnson v. Pannel's Heirs* (2 *Wheaton's Rep.* 206. 220.)

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2. Then is the application of this principle of construction to be at all varied by the circumstance of *Samuel Ogden* coming in as a purchaser? The deed to the lessor of the plaintiff, recites a previous contract for the conveyance of this land, made the 5th of *August*, 1795; *Ogden*, claiming under the same title, is bound by the notice of this fact, especially as the peculiar description in his deed apprised him of the recital in the deed to *C.*, and that his grant was to depend on the *prior location* of *C.*'s grant. A purchaser with notice is, in equity, bound to the same extent, and in the same manner, as the person of whom he purchased. (*Sugden's L. of V.* 484. 1 *Johns. Ch. Rep.* 576, 577.)

Where a deed is made pursuant to prior articles of agreement which are recited in the deed, the recital, though not strictly a part of the deed, may yet be made use of to explain the intention of the parties. (*Shep. T.* 76. n. 2. 4 *Cruise*, 430. tit. 32. ch. 23. s. 38. *Phillips's L. of Ev.* 356. *Cuyler v. Bradt*, 2 *Caines's Cases in Error*, 326. 334.)

Again; this description in the deed is matter in *pais*, on which the jury should decide. (1 *Term Rep.* 701.) There ought, as was observed by Ch. J. *Marshall*, in *Massie v. Watts*, in regard to the peculiar circumstances of the country, to be a most liberal interpretation of the deed. *Morris*, the proprietor of this extensive wilderness, was obliged, for want of actual surveys, to give conjectural lines or boundaries to his grants.

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**Van Vechten*, contra. The principles of law contained in the authorities cited are not denied. The difficulty lies in their application. In this deed, the place of beginning is fixed, and the lines are given, and it was the intention of the covenants in the deed, to protect the location according to those lines. Every deed is to be construed and located according to the *description* of the premises conveyed. Where the description is certain and not repugnant, it must be taken as it is; the court has no authority to depart from it. It is true that the deed says that the grantee is to have 33,750 acres; but he must have it within the lines given: he cannot go beyond them. Suppose the place of beginning to be a notorious natural boundary, must it not be taken for the purpose of *location*, though, in consequence of prior grants, the lines given may not comprehend the *quantity* of acres granted? The diagram shows the intention of the parties as to the location. To allow the lessor of the plaintiff to push his grant south on the land of *Ogden*, and *Ogden* on to that of *Cottringer*, would be departing from the terms of description, from which only we are to collect the intention of the parties. The lessor of the plaintiff must rely on his own title; he cannot look to the deeds of other parties to support his claim. The court are not to decide a question of equity or justice between *Morris* and *Craigie*; but what, in an action of ejectment, is the true lo-

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cation of this grant, according to the legal construction, founded on established rules and principles of law. C. has a right of action, on the covenants in his deed, against *Morris* or his heirs, to make good any deficiency in the land ; but his deed must be *located* according to the boundaries and lines given. The defendant is not bound by the recital in C.'s deed, which is dated subsequent to that of the defendant. The place of beginning agreed upon by C. and M., is fixed and certain. The agreement in 1795, cannot control a deed given in 1797. The deed is evidence of the agreement of the parties at the time. If the court go beyond the terms of the description, they will, in fact, make a new agreement for the parties : for, it is admitted, that the south-west corner of the 100,000 acre tract is the true place of beginning. But it is said, that the description is matter in *pais*. True, where *the place of beginning is ambiguous or uncertain ; not so, where it is fixed and clear.

As to the case of *Massie v. Watts*, which has been relied upon by the counsel for the plaintiff ; it was on the *equity side* of the Supreme Court of the *United States*. Besides, the court, in that case, say, that the *material calls* are to govern, or, in our language, the material parts of the description : that is, where there are any clear, fixed, and indisputable points or boundaries, they must be observed.

Henry, in reply. Is there, in this case, that absolute certainty, those fixed objects or terms, which must control and govern the location ? M. was indebted to C. 33,750 dollars, for which he agreed to convey to him 33,750 acres of land. *Quantity* was the object and intention of the parties ; and that intention is to govern, unless controlled by some fixed and immovable bounds. It is asked, what would be the construction, if a fixed *natural* object had been given as the place of beginning ? But, in this case, the place of beginning is a supposed *artificial* point, taken for the purpose of extending lines, altogether arbitrary and imaginary, so as to include a certain quantity of acres of land. Suppose the *transit line* had been run so as to cut off three miles from the supposed base, is the lessor to have only *half* the quantity granted to him ? Did not the court, in their construction of the patent of *Kayaderoseras*, reject a lot, in order to fulfil the intent of the grantor ? Will they not, then, reject an impracticable place of beginning, in order to fulfil the intent ? The place of beginning was mentioned merely for the purpose of giving to the grantee, by an extension of lines, a certain quantity of land. If cut off from the south-west corner of the tract of 100,000 acres, the location must come as near as possible. Such is the doctrine in *Plowden*. According to the argument of the counsel for the defendant, no description, whatever, in a deed, can ever be departed from, or the lines extended, to fulfil the most manifest intention of the parties. In the case of the

Sacondaga patent, there was no concluding or closing line, yet this court supplied it, in order to fulfil the intent.

*The case of *Massie v. Watts*, it is true, was on the equity side of the court; but the court take into consideration the peculiar situation of the country, and they vary the lines to carry into effect the intention of the parties. If the court is to be so rigidly confined to the south-west corner of the 100,000 acre tract that they cannot vary from it, then there is no place of beginning, and the grant cannot be located at all. Yet it is admitted, by the other side, that it may be located in part, by beginning two miles farther *east*. The location is to extend "southerly, so far as, by lines drawn, &c., will include 33,750 acres." The lines are to be drawn parallel, and *so far* as to include the quantity mentioned. The east and west lines of the 100,000 acre tract were not to be continued; but the possible diminution of the base mentioned, was contemplated by the grantor, and the lines were to be extended south, so far as to supply any deficiency which might arise from that circumstance. If the eastern and western lines were not to be *rolled out*, or extended *south*, so as to include the quantity, but were to be confined strictly, according to the words, why was not the length of these lines fixed at once? There are, then, peculiar terms of description used in this deed, which show that the boundaries or lines were not immovably fixed; but were to be varied or extended, so as to carry the intention into effect.

But, it is said, the court cannot adopt the construction for which we contend, because, forsooth, there are personal covenants in the deed, to which the plaintiff may resort for damages. But if *M.* was insolvent, and now in court, might not *C.* say, "you granted me 33,750 acres of land, for which you were paid; you own land south sufficient to make up that quantity; and by your own act you have precluded me from taking a base of six miles, and am I now to be told to look to the covenants?" Again; if we look to the terms of description in the deed to *Ogden*, it is clear, that his deed cannot be located, until the deed to *C.* is first satisfied. The tract granted to him is *to be admeasured*, "beginning at the south-west corner of a certain tract of land of thirty-three thousand seven hundred and fifty acres, granted or to be granted by the said *Robert Morris* to *Andrew Craigie*," &c. The location of *O.*'s tract is then, by *express terms, made dependant on the prior location of *C.*'s tract. In regard to the latter, *O.* stands precisely in the situation of *M.*, and can have no better right. He might, finding no interfering grant *east*, extend two miles farther in that direction, and so he has, in fact, done; *M.* intended to make all his grants bound by straight lines, and to exclude the *Genesee* flats.

Admitting that the *recital* is not evidence; still the substance of *O.*'s grant is made dependant on the grant to *C.* *first to be*

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located. The lines given being parallel and defined or limited, *M.* could not object to their extension south, so as to fulfil the intention of the grant to *C.*; and *O.*, so far coming in place of *M.*, must be governed by the same construction as if the suit were against *M.*

Per Curiam. The case admits that *Robert Morris* is the source of title to both parties. The lessor of the plaintiff claims title to the premises, under a deed from *Morris*, bearing date the 6th of *April*, 1797. It recites an agreement made between the parties on the 5th of *August*, 1795, whereby *Morris* covenanted to convey and assign to *Craigie*, his heirs and assigns, for ever, the tract and parcel of land described in the deed; and it then grants to *Craigie*, a certain tract of land lying in the county of *Ontario*, &c. "to be admeasured according to the following bounds and lines: *beginning at the south-west corner of a certain tract of land of 100,000 acres, granted to Craigie, Watson and Greenleaf, on the 18th of February, 1792, thence extending east, along the southern boundary of said tract, six miles, thence southerly, so far as, by lines to be drawn from those two points, parallel to the eastern and western boundaries of the said 100,000 acre tract, will include therein the quantity of 33,750 acres of land.*"

The case concedes, that the place of beginning of the tract, including the premises in question, is fixed and certain. The line, therefore, must be run from that point, according to the courses and distances, to ascertain the lands granted. The fact, that *Morris's* anterior grant to *Le Roy, Linklan and Boon*, had divested him of the title to two miles in width of the land granted to *Craigie*, (which is the basis of the plaintiff's claim to extend his grant on to the lands granted by *Morris* *to *Ogden*,) does not warrant a location upon other lands not authorized by the terms of the deed. The principle on which the location contended for rests, is, that the base given to *Craigie*, was *six miles*, and that the grantor had, by a prior grant, narrowed this one third, and that it is a grant of quantity founded on the six mile base, and that, therefore, the grantee has a right to his quantity upon any of the contiguous lands of the grantor. We cannot accede to this proposition, where there is a known and well ascertained place of beginning. In such case, the grant must be confined to the lands corresponding with the boundaries given in the deed. It would seem to be equitable, if *Morris* continued to own the adjoining land, that the grant should be satisfied; by being extended on his other lands, so that the grantee might have his complement; but even then, we much doubt, whether a court of law could afford the relief, in a case where there was no question as to the actual boundaries of the tract granted.

In the present case, it would operate inequitably, to permit the plaintiff to extend his grant upon lands held by a prior

grant to *Ogden*. It is urged, that the deed to *Ogden* recites, or refers to the prior agreement made between *Morris* and *Craigie*; and were we to admit, that *Ogden* had read that contract, and fully understood it, he must have known how the tract agreed to be conveyed to *Craigie* was to begin, and what it was to include, and that it did not touch or interfere with the tract granted to him. We are ignorant of any principle on which the boundaries of a deed can be rejected, when they are susceptible of a definite and certain location, on the ground, that the grantor did not own part of the land granted, but did own contiguous land. Here, the case is stronger against the plaintiff. The grantor, when he conveyed to *Craigie*, did not own the lands in question, and, therefore, there is no equity in the plaintiff's claim.

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Judgment for the defendant. (a.)

(a) *Jackson*, ex dem. *Bond*, v. *Root*, 18 *Johns. Rep.* 60. *Jackson*, ex dem. *Swain*, v. *Remsen*, 18 *Johns. Rep.* 107. *Jackson*, ex dem. *M'Naughton*, v. *Loomis*, 18 *Johns. Rep.* 81. S. C. in error, 19 *Johns. Rep.* 449. *Jackson* v. *Widger*, 7 *Cowen*, 723. *Jackson* v. *Camp*, 1 *Cowen*, 612. *Newton* v. *Prior*, 7 *Wheaton's Rep.* 10. 6 *Ib.* 582. *Jackson* v. *Moore*, 6 *Cowen*, 706, and n. 720. 5 *Cowen*, 346. 7 *Cowen* 723. *Jackson*, ex dem. *The People of the State of New-York*, v. *L. Wendell*, 5 *Wendell's Rep.* 142.

*JACKSON, ex dem. STEWART, against KINGSLEY.

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THIS was an action of ejectment, to recover lot No. 4. in *M'Key's* patent, in the town of *Worcester*, in *Otsego* county, tried before Mr. Justice *Platt*, at the *Otsego* circuit, in 1818.

At the trial, the plaintiff proved, that a notice had been duly served on the defendant's attorney, to produce, at the trial, a lease, in perpetuity, from *James V. Romaine* to the lessor of the plaintiff, or that parol evidence would be given of its contents. The defendant, accordingly, produced a lease of the premises in question, dated the 15th of *January*, 1801, executed by *Romaine* and the lessor of the plaintiff, to the lessor of the plaintiff, his heirs and assigns for ever, paying an annual rent of 15 dollars.

The defendant's counsel objected to the lease being read in evidence, without first proving the execution thereof by the subscribing witnesses, or in some other legal mode. It appeared, that the names of the subscribing witnesses had been

Where a party to a suit, pursuant to a notice for that purpose, produces an instrument to which he is party, and under which he claims a beneficial interest, it is not necessary for the other party to prove its execution. In other cases, however, the execution of the instrument must be regularly proved by the party calling for, and offering it as evidence in the cause.

The circumstances of the names of the subscribing witnesses being torn off, will not exempt the party from the necessity of proving the hand-writing of the party who executed it, there being no evidence that the party producing the deed had mutilated it.

Where *A.*, a lessee, agreed to sell the lease to *B.*, for a certain sum, and endorsed his name on the lease, and delivered it to *B.*, who paid him the purchase money, and agreed to pay the rent in arrear, and to become due to the lessor in the lease: *Held*, that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, and that, therefore, *B* was not entitled to a notice to quit.

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torn off. The judge decided, that the deed coming out of the hands of the defendant, under these circumstances, no further evidence concerning it was necessary. The lease was, thereupon, read in evidence, and the lessor of the plaintiff proved, that some time after its execution, he went into possession of the premises, on which he lived several years; and that, at the commencement of this suit, the defendant lived on the premises.

The defendant, after proving the hand-writing of the lessor of the plaintiff, whose name was endorsed on the lease, offered to prove that, about ten years ago, *Thomas Benton* agreed to purchase of the lessor of the plaintiff, the premises in question, for 750 dollars, and that *Benton* was to pay *Romayne* the rent then in arrear, and which should become due thereafter; and that, in pursuance of this contract, *B.* paid the lessor of the plaintiff the sum of 750 dollars, *who, thereupon, endorsed his name on the lease, and delivered it to *Benton*, who immediately went into possession of the premises, and continued in possession until his death, leaving a wife and children; and the defendant, afterwards, married the widow, and lived with her on the premises, until the commencement of this suit. The evidence was objected to by the plaintiff's counsel, who stated that no rent had ever been paid by *Kingsley* or *Benton*, that *K.* was insolvent, and that the lessor of the plaintiff, the original lessee, was called upon for the rent. The judge rejected the evidence, and charged the jury to find a verdict for the plaintiff; and the jury, accordingly, found a verdict for him.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court without argument, on the above case, and the points and authorities stated thereon.

SPENCER, Ch. J., delivered the opinion of the court. In *Betts v. Badger*, (12 Johns. Rep. 223.) we laid down this rule, that if the party producing an instrument, on notice, is one of the parties to the instrument, the custody of the paper affords high presumptive evidence that he holds it as a muniment, and, *prima facie*, it is sufficient proof of the execution. The same rule was adopted by the Court of Common Pleas in *England*, in *Pearce v. Hooper*, (3 Taunt. 60.) In that case the chief justice observed, "the mere possession of an instrument does not dispense with the necessity which lies on the party calling for it of producing the attesting witness." He puts the case of an heir at law being in the possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will; then the heir claiming against the will, it would be hard that it should be taken to be proved against him because he produced it. *Phillips*, (346.) says, the result appears to be, that where a party to a suit, in

arsuance of a notice, produces an instrument to which he is party, and under which he claims a beneficial estate, it will not be necessary that the other party, a stranger to the instrument, should call an attesting witness to prove the execution; but that in other cases, the execution ought to be regularly proved by *the party who offers the instrument as part of his evidence in the cause. This I consider, now, the settled law upon the subject, with this qualification, that it is immaterial whether the party who calls for the production of the deed be a party or a stranger to it. In the present case, the defendant is not a party to the lease, in any sense of the word; nor does he claim, personally, any beneficial interest under it. This case, therefore, does not come within the rule; and the plaintiff was bound to prove the execution of the lease. The judge, in admitting it to be read, was probably influenced by the fact, that the names of the subscribing witnesses were torn off; but there is no proof, or circumstance raising a presumption, that the defendant had mutilated the instrument. This fact, then, did not absolve the plaintiff from the necessity of proving the hand-writing of the lessor; and, under the circumstances, that would have been the only mode of proof.

The objection, that notice to quit ought to have been given, is untenable. The relation of landlord and tenant never existed between the parties. *Benton* purchased the interest of the lessor of the plaintiff, as a lessee in the lease from *Romayne*. He was not to pay him any rent, but was subject to pay the rent to *Romayne*. The lease was never assigned in such manner, as to vest *Benton* with the title, and, consequently, the lessor of the plaintiff had the legal estate under the lease. As between them, it was an agreement to sell, and in such case notice to quit is unnecessary. (3 *Johns. Rep.* 422. 13 *Johns. Rep.* 106.)

A new trial must be granted, with costs to abide the event, on the first point.

New trial granted. (a)

(a) See *Harden v. Kretzinger*, post, 293. *Jackson v. Cody*, 9 *Coben*, 140.

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*FITCH and others, executors of FITCH, against
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The plaintiff claimed title to lands under the *Saratoga* patent, and the defendant, claiming the same lands under the *Kayaderosseras* patent, executed a release to the plaintiff, of the same land, to which he claimed title.

In an action brought by the plaintiff for a breach of the covenant of seisin in the defendant's deed, on the ground that the land, in fact, was within the *Saratoga* patent, and, therefore, the defendant was not seised, &c. Held, that the plaintiff, by accepting the conveyance from the defendant was estopped from alleging that the lands released to him, did not lie within *Kayaderosseras* pa-

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tent, or that the defendant was not seised of the land in consequence of the prior seisin of the plaintiff under the *Saratoga* patent, which was the oldest.

The covenant of seisin extends only to a title existing in a third person, and which might defeat the estate granted by the defendant.

If there had been fraud on the part of the defendant, and the plaintiff had, by undue means, and in ignorance of his rights, been induced to take a deed of his own land from the defendant, it seems that he might have relief in Chancery.

THIS was an action on a covenant of seisin in a deed, tried at the *Saratoga* circuit, in June, 1818, before Mr. Justice *Van Ness*. The deed, from the defendant to the testator, was dated April 23, 1814. It was for all that certain tract, piece, or parcel of land, situate, &c., or lots No. 10 and No. 11, in the ninth allotment of the *Kayaderosseras* patent, beginning, &c. The defendant pleaded that he was seised, &c., in the premises so conveyed, and had good right to convey, &c., and specially set forth his title under the *Kayaderosseras* patent, and averred, that the premises were within that patent; to which the plaintiff replied and took issue. At the trial, the defendant, in support of his plea, gave in evidence the *Kayaderosseras* patent, dated the 2d of November, 1708, the easterly line of which is bounded by the westerly line of *Saratoga* patent; a deed of partition, and divers mesne conveyances; and, to conclude the plaintiff from denying the defendant's title, and to estop him from denying that the land in question was part of lots 10 and 11, in the ninth allotment of the *Kayaderosseras* patent, offered in evidence a writing under the hands and seals of the defendant and the testator, dated the 21st of May, 1812, by which it was agreed between them, that the defendant should withdraw the suit which he had commenced in the Supreme Court against the testator for land which he claimed to hold in the town of *Saratoga*, and that each party should pay his own costs; and the testator released to the defendant all the land in lots No. 10 and 11, in the ninth allotment of the *Kayaderosseras* patent, that is not included in the testator's deed from *Jonathan Lawrence*, recorded in the office of the clerk of *Saratoga*, and a survey was to be made, exactly according to the boundaries of the said deed, by *Caleb Ellis*, as soon as the parties would procure him to do it. The defendant, also, offered to prove that, soon after this agreement, in the lifetime of the testator, *Caleb Ellis*, with the defendant, surveyed the lines of the land occupied by the testator under the deed from *Lawrence*; and that according to such survey, the lands so occupied fell within the patent of *Kayaderosseras*, locating that patent as now claimed by the defendant, and as it is laid down on the map.

This evidence, the agreement and proof of survey being objected to by the plaintiff's counsel, was overruled by the judge.

The plaintiff then gave in evidence the letters patent for the tract of land, called the *Saratoga* patent, dated the 9th of *October*, 1708, to *Peter Schuyler* and others; and the original map and partition of that patent, as surveyed and divided by *John R. Bleeker*, in 1750, by which it appeared, that the premises in question are within the west end of lot No. 25. of the grand division of the *Saratoga* patent. The plaintiff next gave in evidence a release in fee from *Jonathan Lawrence*, one of the proprietors of the *Saratoga* patent, to the testator, dated the 25th of *January*, 1798, for the consideration of 3,750 dollars, of lot No. 16., being part of lot No. 25. of the grand division of the *Saratoga* patent, containing 165 acres.

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It was admitted, on the trial, that by the location of the *Kayaderoseras* patent, as laid down on the map of partition, the premises in question are included in that patent; that the patent of *Saratoga* laid down in the said map, is located, on the supposition, that in running the six miles west from the river at the first station, the line is to be run according to the windings and turnings of *Anthony's Kill*; and that the first line west of the *Saratoga* patent, as laid down on that map, although extending west six miles, according to the windings and turnings of that creek, extends but four miles and a half from the river in a straight line. That, according to the location of the *Saratoga* patent by *Bleeker* in 1750, the premises in question are in that patent, and no part thereof within the patent of *Kayaderoseras*. That, *according to *Bleeker's* location, the first line west extends six miles from the river on a straight line, and that the western line is, in all places, but six miles from the river, in some one direction, so that a right or perpendicular line from any part of the premises in question to the river, will reach within the six miles. That the creek called *Anthony's Kill* does not extend six miles into the woods on a straight line. That the deed from *Lawrence* to *Fitch*, the testator, includes all the lands in the deed from the defendant to the testator, on which this suit is brought.

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The jury found a verdict for the plaintiff for 1,819 dollars and 56 cents, being the consideration money expressed in the deed, with interest, subject to the opinion of the court, on a case containing the facts above stated.

M Kown, for the plaintiffs. All the lands first purchased by the testator from *L.*, were again purchased of the defendant, and he was thus seised under both patents. We admit, that if the defendant was seised at all it was under the *Kayaderoseras* patent. The patent of *Saratoga* is the eldest, and its words of location must be first fulfilled. In the construction of the *Hoosick* patent, the court said, the lines were to run parallel with the creek, according to its windings, as far as practicable, so as, in no instance, to be nearer than two miles

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to the middle of the creek. (2 *Johns. Cases*, 37.) The same principle has been adopted in the construction of other patents. (2 *Caines*, 363. 367. 2 *Johns. Rep.* 297. 5 *Johns. Rep.* 440. 9 *Johns. Rep.* 102.)

Bleecker's survey has been so often before the court that it is unnecessary to remark upon it. Parol evidence as to the survey was properly rejected.

The covenant of seisin, in this case, was broken as soon as it was made. (2 *Johns. Rep.* 1. 4 *Johns. Rep.* 72.)

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Huntington and *Van Vechten*, contra. The agreement between the testator and the defendant is of the nature, and must have the effect, of an *award*, which, though it does not operate as a conveyance, will conclude and *estop* the party. *F.*, the testator, was, therefore, estopped to deny the defendant's title. (*Kyd on Awards*, 55. 62.) Besides, it was *an agreement to settle a boundary line or survey. (2 *Caines's Rep.* 198, 199. 327. 9 *Johns. Rep.* 43. 15 *Johns. Rep.* 197. *Doe v. Rosser*, 3 *East*, 15. 4 *Burr.* 2209.)

Again; the testator claimed under the *Saratoga* patent, and took a deed for the same premises from the defendant, who held under the *Kayaderoseras* patent. Is he not then *estopped*, as between the defendant and him, to say, that this land does not lie in the *Kayaderoseras* patent? (*Jackson, ex dem. Brown, v. Ayers*, 14 *Johns. Rep.* 224.)

Again; are the plaintiffs entitled to recover the full consideration and interest as damages, when the testator has never been evicted or disturbed? The land lies in one or other of the patents, and he holds under both. This negatives the possibility of their ever being disturbed or evicted.

The effect of a recovery in an action on the covenant of seisin is to rescind the conveyance. (5 *Johns. Rep.* 53.)

Henry, in reply. The agreement between the testator and the defendant is not an award, nor in the nature of an award. It is a release of any land not comprised in *L.'s* deed; and the agreement was merged in the deed. The cases, therefore, which have been cited, as to the effect of an award, have no application. The parties merely designated a person to do a certain act, or to make a survey of the land. This was not a submission.

The plaintiffs, having established a breach of the covenant of seisin, are entitled to recover damages to the amount of the consideration, with interest.

Per Curiam. The plaintiffs have declared in covenant on a deed executed by the defendant to their testator, for lots in the *Kayaderoseras* patent, which deed contained a covenant of seisin.

The defendant has pleaded, that he was seised and had

good right to grant the premises, and specially sets out his title. The replication takes issue on the plea. The defendant deduced a title to himself under the *Kayaderosseras* patent. The plaintiffs introduced in evidence the *Saratoga* patent, which is prior, in point of date, to that of *Kayaderosseras*, and deduced a title to their testator, by a deed from **Jonathan Lawrence*, of the 25th of *January*, 1798, under that patent.

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It appears that the deed from the defendant to the plaintiffs' testator was made under an agreement between them, under their hands and seals, dated the 21st of *May*, 1813, whereby it was stipulated that *Baldwin* should withdraw a suit he had commenced against *Fitch* in this court, for lands which *Fitch* claimed to hold in the town of *Saratoga*, each party to pay their own costs; and *Fitch* released to *Baldwin* all the lands in lots No. 10 and 11. in the 9th allotment of the *Kayaderosseras* patent, that were not included within the bounds of *Fitch's* deed from *Lawrence*, and a survey was to be made, according to the boundaries of the said deed, by *Caleb Ellis*, as soon as the parties could procure him to do it. The case goes on to state the survey by *Ellis*, and the giving the deed by *Baldwin*, in pursuance thereof; but as we do not put the decision on that point, it is unnecessary further to consider it. Nor are we called upon to decide upon the construction of the *Saratoga* patent.

It is evident, that when the agreement of the 21st of *May*, 1813, was entered into, the lands granted by the deed declared on, were claimed by each of the parties: by the defendant under the *Kayaderosseras* patent, and by the plaintiffs under the *Saratoga* patent. We hold *Fitch* and his representatives estopped from alleging, that the lands granted did lie in the *Kayaderosseras* patent, or that *Baldwin* was not seised of them, in consequence of the prior seisin of *Fitch* under the *Saratoga* patent. The allegation, that *Baldwin* has broken his covenant of seisin, by reason that *Fitch* owned the property when he purchased it, is repugnant to the direct acknowledgment in the act of receiving a title, or taking a conveyance from *Baldwin*. Paying a valuable consideration and accepting a deed from *Baldwin*, restrains the bargainee from asserting that the bargainor was not seised of the premises, but that the bargainee was seised. The covenant of seisin extends only to guaranty the bargainee against any title existing in a third person, and which might defeat the estate granted.

The defendant is placed in an extraordinary situation. *Fitch* acquired all the title he had in the premises, and *which is admitted to be good, if they lie in the *Kayaderosseras* patent; and yet, without having rescinded the contract of sale, and put *Baldwin* free to contest the question of conflicting boundary, the plaintiffs proceed upon a supposed want of title of which their testator was conusant. It never can be permitted to a person, to accept a deed with covenants of seisin, and

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then turn round upon his grantor, and allege that his covenant is broken, for that, at the time he accepted the deed, he himself was seised of the premises. If there had been fraud in the case, and the plaintiffs could have shown that the testator had been induced, by undue means, and in ignorance of his rights, to take a deed for his own land, there might be relief in a court of equity. In the case of *Jackson, ex dem. Brown and others, v. Ayres*, (14 Johns. Rep. 224.) the defendant had entered into an agreement to purchase of one of the lessors the lands then in question, and a deed had been tendered and refused; in an action of ejectment brought by *Brown*, the defendant offered to prove that one *Dobkins* had possession of the premises 40 years before the trial, and that the defendant was in possession, claiming title, and had a deed from the heirs of *Dobkins*. We held, that the defendant was estopped, admitting that he entered under *Dobkins*, and had a deed from his heirs at the time he agreed to purchase from *Brown*, unless he was in some way deceived or imposed upon in making such agreement. In the present case, the agreement was consummated by a deed; and upon every principle the plaintiffs are estopped.

Judgment for the defendant.

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A *feme covert* cannot bind herself personally by a covenant or contract during the coverture.

Therefore, a deed executed by husband and wife, with covenant of warranty, does not stop the wife, in an action of ejectment against her, after the death of her husband, from setting up a subsequently acquired interest in the same lands.

The right to dower rests in action only, and cannot be so aliened as to enable the grantee to bring an action in his own name.

Dower cannot be recovered, in an action of ejectment, until it has been assigned.

Parol evidence is inadmissible to show that an execution, on which a levy and sale had been made, had been withdrawn, and the levy abandoned by the plaintiff, in contradiction to the sheriff's deed.

The remedy of the party is by application to the court to set aside the sale under the execution

THIS was an action of ejectment, tried at the *Rensselaer* circuit, in *July*, 1818, before Mr. Justice *Van Ness*.

The plaintiff gave in evidence a deed from *Jacob J. Vanderheyden*, and *Catharine* his wife, (the defendant,) duly acknowledged, by which they granted and conveyed to the lessor of the plaintiff the premises in question, in fee, with warranty.

A witness testified, that the premises were part of an estate held and possessed by the father of *Jacob J. Vanderheyden*, under whom he derived title, by devise or descent, and that he was in possession of the premises at the date of the deed; and that the said *Jacob* died before the commencement of this suit.

By an agreement, dated the 10th of *April*, 1816, between the defendant and *John D. Dickenson* and others, the defendant covenanted, as soon as convenient, and when requested,

to release to them all right and title of *dower*, as the wife of *Jacob J. Vanderheyden*, in certain lands claimed by them, and give up all deeds, &c. And they covenanted, on receiving such release, to convey to her, in fee, lot No. 242, part of the premises in question; and to remove, and put a barn standing on the adjoining lot, on lot 242, &c.

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A witness proved, that the defendant went into possession of the premises by virtue of this agreement.

The defendant then offered to prove a title in *John D. Dickenson* and others, by virtue of a judgment and execution in favor of *John Kimberly*, against the said *Jacob J. Vanderheyden*, docketed the 5th of *September*, 1810, for 2,000 dollars. This evidence was objected to, on the ground that the defendant was *estopped* by her deed, and the covenants in the deed, from setting up any thing in opposition thereto. But the objection was overruled by the judge; and *the judgment and execution, and a sheriff's deed, dated the 12th of *March*, 1813, to *John D. Dickenson*, for the premises in question, and the articles of agreement, were read in evidence.

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The plaintiff then offered to prove, that the execution was withdrawn from the sheriff, and the levy abandoned, after the levy was made, and after the return of the execution, at the instance of *Dickenson*, and that *Dickenson* was, in fact, the owner of the judgment at the time the execution was so withdrawn, and the levy thereon abandoned, and at the time of the sale under it. But this evidence was rejected by the judge, who charged the jury to find for the defendant, observing, that the covenants in the deed did not bind her; that, as the plaintiff had not deduced and proved title in her, at the time of executing the deed, it could only pass an *inchoate* right of dower, consummated by her husband's death, which was interest not recoverable in ejectment, and that the deed could not *estop* the defendant from setting up an outstanding title, or any other defence; and the jury, accordingly, found a verdict for the defendant.

On a case containing the facts above stated, a motion was made for a new trial, which was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The defendant was not estopped by the deed she executed with her husband, to the lessor of the plaintiff, for the premises in question. It is a settled principle of the common law, that *coverture* disqualifies a *feme* from entering into a contract or covenant, personally binding upon her. She may, at common law, pass her real property, by a *fine* duly levied; and under our statute, she may, also, in conjunction with her husband, and on due examination before a competent officer, convey her real estate, or any existing or contingent future interest in it. But such deed cannot operate as an *estoppel* to her subsequently acquired interest in the same lands. The defendant's subsequent

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agreement with *Dickenson*, in regard to the lots in question, was not affected by the covenants in the deed to the lessor.

*The offer on the part of the plaintiff, to show, that the writ of *fieri facias*, issued under the judgment, in favor of *Kimberly* against *Vanderheyden*, had been withdrawn, and the levy abandoned, was properly overruled. It was an attempt, collaterally, to contradict the sheriff's deed, and this we have held (*Jackson v. Croy*, 12 *Johns. Rep.* 429.) to be inadmissible. The plaintiff's remedy, if the facts would authorize it, would be an application to the court to set aside the sale.

I do not understand, that the plaintiff relies on the right of dower acquired under the deed from the defendant and her husband. If, however, that right is insisted on, the answer is decisive, that it is a right resting in action only; it cannot be so aliened as to enable the grantee to bring an action in his own name; a *feme covert*, or a widow, may release her claim of dower so as to bar her, but she can invest no other person with the right to maintain an action for it; and, besides, dower cannot be recovered, in an action of ejectment, until it has been assigned. (a)

Motion for a new trial denied.

(a) See *Jackson v. Hixon*, ante, 123. 126. *Jackson, ex dem. Hooker, v. Young* 5 *Coven*, 269.

SEYMOUR against JONAS MINTURN.

The plaintiff lent the defendant his promissory note, payable to the defendant or order, who endorsed it, and procured it to be discounted at the bank of New-York, and received the money.

THIS was an action of *assumpsit*, tried at the New-York sittings, in November, 1818, before the late chief justice.

*The declaration contained the usual money counts, an *insimul computassent*, besides special counts.

In the year 1814, the plaintiff lent to the defendant and his partner, *William Minturn*, his promissory note, dated September, 13, 1814, for 2,900 dollars, payable to them, or order, sixty days after date. The note was discounted at the bank of New-York, for the accommodation of *W. and J. Minturn*,

The note was protested for non-payment; and the defendant being insolvent, the plaintiff signed a written agreement discharging him from all debts and demands, &c. The bank, (with other creditors,) also executed the agreement by its corporate seal. Afterwards, the plaintiff paid the bank, as holders, the amount of the note, and brought an action against the defendant for so much money paid to his use: Held, that the release of the defendant, by the bank, did not discharge the plaintiff, as maker, especially as the bank did not know for whose accommodation the note was discounted; and that, therefore, the plaintiff did not pay the money, afterwards, in his own wrong.

That the agreement, for want of the seal of the plaintiff, could not operate as a release; and the consideration being merely nominal, it could not operate as an *accord and satisfaction*.

Though a promise, by words, may be discharged by *parol*, before it is broken; yet where an agreement is, on an adequate consideration, to pay a sum certain, it cannot be discharged by an agreement to receive a less sum.

Besides, the plaintiff having no debt or existing demand, at the time the agreement to discharge the defendant was executed, that agreement could not have the effect to discharge a right of action acquired subsequently, by the payment of the money by the plaintiff, to the holders of the note.

who received the money thereon; when the note became due, it was protested for non-payment; and afterwards, on the 1st of *June*, 1816, the plaintiff paid 1,100 dollars on account of the note, and on the 3d of *January*, 1818, after this suit was commenced, he paid the residue of the principal and interest thereon; to recover the amount so first paid by the plaintiff, the present suit was brought. The bank did not know for whose accommodation the note was discounted.

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The defendant's counsel read in evidence a writing, dated *November* 24, 1814, signed by the plaintiff and his creditors of *W.* and *J. M.* and to which the president and directors of the bank of *New-York*, were, also, parties, having executed it by their corporate seal. This writing, after reciting that the said *W.* and *J. M.* were indebted to the subscribers, respectively, on promissory notes or book accounts, which they, in consequence of losses and misfortunes, were unable to pay, and that in consideration of their inability to pay and satisfy their several demands, they (the subscribers) had consented, respectively, to discharge them, (*W.* and *J. M.*), and each of them, of and from all future claims and demands on account thereof: therefore, in consideration of the premises, and of *one dollar, &c.*, they, the subscribers, did thereby release and discharge the said *W.* and *J. M.* of and from all debts, dues, and demands, which they had against them, or either of them, as drawers or endorsors upon any promissory notes, or upon accounts, or any contract, agreement, or obligation, whatsoever.

It appeared, that the note in question was held by the bank of *New-York*, under protest, at the time that the above-mentioned release was executed.

A verdict was taken for the plaintiff for the 1,100 dollars, and interest, after deducting a sum received before the suit, *on account of the demand, subject to the opinion of the court, on a case containing the facts above stated.

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Bunner, for the plaintiff. On the face of the case, the plaintiff is entitled to recover. It was objected, at the trial, that the demand being for money paid to the use of *William* and *Jonas Minturn*, the proof would not sustain an action against the defendant alone; and that the variance was fatal. The answer is, that this should have been pleaded in abatement. (2 *Johns. Cas.* 383. *Rice v. Shute*, 5 *Burr.* 2611. 2 *Bl. Rep.* 947.) Then, as to the release or discharge set up by the defendant, we contend that, as between these parties, it is void, not being under seal, for want of a consideration. It can neither operate as a *release*, nor by way of *accord and satisfaction*. (4 *Johns. Rep.* 235. 6 *Johns. Rep.* 194. 8 *Johns. Rep.* 444. 9 *Johns. Rep.* 358. 2 *Johns. Rep.* 186. 5 *Johns. Rep.* 387.)

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The bank of *New-York*, it is true, affixed their seal, but no assent can be implied, to make it the deed of the plaintiff.

This case does not come within the principle of law, that the discharge of the principal debtor discharges the surety. The case of *Fenton v. Pocock*, (5 *Taunt. Rep.* 192.) is in point. It was there held, that if the holder of a bill of exchange, accepted for the accommodation of the drawer, takes a *cognovit* from the drawer, for payment by instalments, he does not thereby discharge the acceptor; and that there was no difference between an acceptance for accommodation and an acceptance for value; and that the cases of *Laxton v. Peat*, (2 *Campb. N. P.* 185.) and *Collet v. Haigh*, (3 *Campb.* 281.) decided by Lord *Ellenborough*, were not law.

On the face of the note, as between the parties, the maker is the principal debtor, and the endorser the conditional security. The holder may discharge a prior endorser and sue a subsequent one. (*Hayling v. Mulhall*, 2 *Wm. Bl.* 1235.)

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D. B. Ogden and T. A. Emmet, contra. It is admitted, that the objection as to this not being a joint action comes too late. The only point is, whether the release or agreement in writing was not a discharge of the plaintiff's right of *action? There was no consideration paid for this note. It was merely lent by the plaintiff to the defendant and his partner, for their accommodation. The same motive or desire to benefit his friend induced the plaintiff to execute the release. The plaintiff, by writing, promises to pay the defendant a certain sum of money; he then proves, by *parol*, that he was a mere lender of his name, by note. Surely if an agreement exists by *parol*, it may be released by *parol*. *Solvitur eo ligamine quo ligatur*. If the defendant had brought an action on the note against the plaintiff, the latter might have shown, by *parol* evidence, that he never received any consideration, but was a mere lender of his note to *M.* and his partner. It is said, here was no release, because it was not under *seal*. The plaintiff being a party to the instrument, to which the bank of *New-York* affixed their seal, intended, no doubt, to confer a benefit on *M.* and his partner, and to release them from all liability to him. If he did not so intend, it was a fraud on the other creditors who signed the discharge. When the writing was signed there was no debt to be released, nothing but a mere liability. Before a right of action accrues, a promise or liability may be released by *parol*. A promise before it is broken may be discharged by a *parol* agreement; (*May v. King* 12 *Mod.* 538. per *Holt*, Ch. J. *Cro. Car.* 383. 2 *Lev.* 214.) for until there is a debt or duty, there is nothing on which a release can operate. It was uncertain whether there would be a debt: so we admit that it could not be an *accord and satisfaction*, for there was no debt to be satisfied. But a less sum, paid before the right of action

accrues and accepted by the party, is a good accord and satisfaction. (*Watkinson v. Inglesby & Stokes*, 5 Johns. Rep. 336. 391. per *Van Ness*, J. Co. Litt. 212. b. 5 Co. 117.) A promise to discharge a promise does not require any consideration to give it validity. There is a pecuniary consideration of one dollar, in this agreement, and that is enough to prevent its being a *nudum pactum*.

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Again; the plaintiff does not declare on the note, but for money paid to the use of the defendant. We were debtors, if at all, to the *Bank of New-York*, the holders of the note; and they, by their corporate seal, do release this debt. The plaintiff, afterwards, pays the money. But for whose debt? *not for the debt of the defendant and his partner, for they were, then, duly discharged by the holders. How, then, can it be money paid to the use of the defendant? The plaintiff paid the money, because, being the *maker* of the note, he was legally liable to pay it. The bank executed the instrument with the assent of the plaintiff, who was, also, a party to it. It is an universal principle, applicable to all cases where the relation of principal and surety exists, that a discharge of the principal is a discharge of the surety.

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S. Jones, jun., in reply. Though, as between these parties, this was an accommodation note; yet as regards the holders, the bank, *S.* was the principal, and *M.* and his partner the sureties. The bank, when they discharged the sureties, still retained their right of action against the principal, the plaintiff, who was the maker of the note. As to the objection, that the money was not paid to the use of the defendant, it would equally apply in every other case where the principal is discharged under a bankrupt or insolvent law.

If there was no existing debt, or no debt until the plaintiff paid the money, on what could the agreement or release operate? It was no matter, then, whether it was sealed or not. It could not operate to discharge what did not exist. Suppose it, however, to be the release of a promise, it cannot be valid without a consideration, there being no seal. A seal imports a consideration. But without a seal, it was a simple naked promise. It is agreed, that this agreement could not be pleaded as a release; if good, it might, then, be pleaded as an *accord and satisfaction*; for there can be no valid defence which cannot be put into the form of a special plea. But would a mere nominal consideration of one dollar be sufficient to support a plea of accord and satisfaction? Such a consideration is nothing, unless to support a right. No matter how the case stands between the original parties to the note. It is true, that we cannot sue on the note; that would be absurd. The plaintiff sues on the agreement between him and the defendant, between whom it is a case of principal and surety.

Admitting that this was a parol agreement, and that, as

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*such, it may be released by parol, still there must be a consideration to support it.

But it is said, as the plaintiff assented to the release by the bank, it is, in effect, a release by the plaintiff. There is, however, no evidence that the paper was signed by the common consent of all the parties. The plaintiff signed first and separately, then certain creditors, and after them the bank. It does not appear that the plaintiff, when he signed the agreement, knew that the bank would execute it.

SPENCER, Ch. J., delivered the opinion of the court. The non-joinder of *William Minturn*, as a co-defendant, has very properly been abandoned. The objection could have been taken only under a plea in abatement. The case of *Price and Shute*, (5 Burr. Rep. 2611.) which has never been questioned, is decisive.

The first question is, whether the release by the *Bank of New-York*, to the *Minturns*, destroyed their remedy against the plaintiff, as drawer of the note; so that his subsequent payment to the bank was in his own wrong? The fact is fully made out, that the note was discounted for the accommodation of the *Minturns*, it being unknown to the bank, at any time, for whose accommodation the note was made. The release by the bank was operative as a discharge of the *Minturns*; but the bank had a right to presume, that the plaintiff was the real debtor, for he was the maker of the note; and they had also a right to consider him as consenting to the discharge of the endorsors. It is not to be doubted, that a compounding by the holder of a note with the endorser, with the consent of the drawer, does not discharge the holder's remedy against the latter.

It is indisputable, that the paper writing, signed by the plaintiff, cannot operate as a release, for the want of a seal; (a) but it is insisted, that it may be available as an accord and satisfaction. The want of an adequate consideration is an insuperable objection to its operating in that way. The consideration expressed is one dollar. The cases of *Harrison v. Wilcox and Close*, (2 Johns. Rep. 449.) *Fitch v. Sutton*, (5 East, 232.) and *Cumber v. Warn*, (1 Str. 426.) are decided authorities to show, that the payment of a less sum *of money than the real debt will be no satisfaction of a larger sum, without a release by deed. But again, it has been urged, that the unsealed discharge having been given before the plaintiff had paid any thing to the bank, the implied promise raised by law on the subsequent payment by the plaintiff, would be discharged by parol, without a consideration, on the ground that a promise before it be broken may be discharged by parol; and we are referred to the cases of *Langdon v. Stokes*, (Cro. Car.

(a) A release, without consideration, and not under seal, is void. *Jackson v. Stackhouse*, 1 Cowen, 122. *Strang v. Holmes*, 7 Cowen, 224.

383.) and *May v. King*, (12 Mod. 538.) These cases, undoubtedly, decide, that a promise by words may be discharged by words, before a breach of the promise; but in the broad extent in which the proposition is laid down, these cases cannot be supported. Where there is an agreement, upon an adequate consideration, to pay a sum certain, the promisor cannot avoid that agreement, by an agreement to receive a less sum; this abundantly appears by the cases already cited. An agreement, as in the case of *Langdon v. Stokes*, to go such a voyage before a particular day, may be discharged by parol, before it is broken; for *non constat*, that the promisee has any fixed or certain advantage in the performance of the voyage.

There is a decisive objection to the defence set up. The plaintiff had no existing demand when he signed the paper writing; the discharge is only of such *claims, debts, dues and demands* which the parties signing it respectively had against the *Minturns*, or either of them, as *drawers and endorsors upon any promissory notes then held by* either of the persons subscribing the discharge; and the recital to the discharge is, that the *Minturns* stood indebted to the subscribers respectively, upon promissory notes, or book accounts, and that, in consequence of their inability to pay, and satisfy the demands against them, the subscribers had agreed to discharge them from all future claims and demands for or on account thereof. Now, the plaintiff had no claim, debt, due or demand when he signed the discharge, nor did the *Minturns* then stand indebted to him upon promissory notes, or book account, nor had he any claim against them as drawers or endorsors upon any promissory notes. The plaintiff's claim arose subsequently, and in consequence of his payment to the bank; and he does not bring, nor could he maintain a suit *against the *Minturns*, as endorsors of the note, for the plaintiff is the maker of the note, the payment of which gives rise to this action. The discharge, therefore, does not, in terms, release the plaintiff's right; and, arguing from it, it could not have been the intention of the parties, that the plaintiff's demand, which was then altogether uncertain and contingent, should be discharged. The plaintiff has a right to say, and he can say it successfully, that the discharge does not embrace his present cause of action. The plaintiff is, therefore, entitled to judgment.

Judgment for the plaintiff.

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Mere delay to sue the principal does not affect the rights of the creditor against the surety. A delay, therefore, to sue the maker of a note, after it had become due, does not discharge [* 177] the endorser.

Evidence of what a witness testified on a former trial between the same parties is not admissible, unless it is first shown that the witness is dead.

Where A. made a note payable to the defendant or order, which was endorsed by the defendant for the purpose of being discounted at a bank for the accommodation of A., who, on its being refused at the bank, negotiated it to a third person, at a discount, with a knowledge of the circumstances, this does not amount to a fraud which can affect the rights of the holder against the maker or endorser.

A party to a negotiable note is a competent witness, in a suit on that note, to

prove any fact which has arisen subsequently to his becoming a party to such note, which does not involve his own turpitude. By the rule that a party to a negotiable note cannot be a witness to invalidate it, is understood, that a person whose name appears on negotiable paper, shall not be admitted to say, that it was tainted with illegality or fraud when it passed from his hands.

Thus a second endorser is a competent witness to prove that the third endorser had said that he had received and discounted the note on usurious interest.

Where a note is made for the purpose of raising money, and is discounted at a higher premium than the legal rate of interest, and none of the parties, whose names are on the note, could, as between themselves, maintain a suit upon it, when it became payable, if it had not been discounted, then the transaction is usurious, and the note void.

THIS was an action of *assumpsit*, tried before Mr. Justice *Van Ness*, at the *Orange* circuit, in *December*, 1818.

The plaintiffs declared, as third endorsees, against the defendant, as first endorser of a promissory note, dated *July* 14, 1814, for 1,500 dollars, made by *Benjamin Wood*, payable ninety days after date, at the bank of *Newburgh*, to the defendant or order, who endorsed it to *R. & W. Smith*, who endorsed it to *J. and T. Powell & Co.*, by whom it was endorsed to the plaintiffs.

*At the trial, the defendant called *Wm. Smith*, one of the endorsors of the note, to prove that the note was made in order to be discounted at the bank of *Newburgh*; and that the witness having been entrusted with the note to take to the bank, he had fraudulently put it in circulation. The witness testified, that the note in question was a renewal of a former note of the same amount, of which *B. Wood* was the maker, and the defendant was the endorser, and which was made and endorsed for the purpose of being offered for discount at the bank of *Newburgh*, for the accommodation of *Wood*; that the witness also endorsed the note, and presented it for discount at the bank, who refused to discount it; that the witness then called on *Henry Parish*, of the firm of *J. & T. Powell & Co.*, to discount the note, which he did accordingly; and was, at the same time, informed by the witness of the special purpose for which the note was made.

The witness never communicated to the defendant that he had negotiated the note to *J. & T. Powell & Co.* The note in question was made and endorsed for the purpose of taking up the former note of which *Wood* had the exclusive benefit; and the former note was taken up with the proceeds of the present note. The defendant did not know, when he endorsed the note in question, that the former note had been negotiated to *Powell & Co.* The witness said he was not present when the note in question was signed by *Wood*, and endorsed by the defendant. It was delivered to him by *Wood*, and he had no instructions or directions from either, in what manner he was to negotiate it, and nothing passed between them on the subject; though *Wood* knew how he meant to dispose of it,

and both he and the defendant well understood that with the avails of it he was to take up the original note.

The defendant further offered to prove, by the same witness, that *J. Powell*, one of the plaintiffs, had since admitted to him, that the note was usuriously discounted. This evidence was objected to on the part of the plaintiffs, and overruled by the judge.

The defendant then called *Benjamin Wood* as a witness and the purpose of his testimony being stated, he was objected to by the plaintiff's counsel, but admitted by the judge. *He said he was the maker of both the notes mentioned by the last witness; that he procured the defendant to endorse the first note, for his accommodation, to be discounted at the *Newburgh* bank, and the witness delivered it to *Smith* to get it discounted there. The second note was made and endorsed for the purpose of taking up the first, and he delivered it to *Smith* for that purpose, who, on his return from *Newburgh*, told the witness that he had negotiated the note to *Powell & Co.* The witness further stated, that when the defendant endorsed the second note, he told him that it was to be discounted at the *Newburgh* bank, and with the proceeds the first note was to be taken up; and he supposed that the defendant did not know that the first note had not been discounted at the bank, or that it had been negotiated to *Powell & Co.* After the note in question became payable, *October 15, 1814*, *Jacob P.*, one of the plaintiffs, told the witness, that he would give him time to pay, provided he would give security. The note was then in the hands of an attorney for collection, where it remained for about a year, on the promise of the witness to give security. The witness, after the note fell due, had extensive dealings with *Powell & Co.*, and had paid them above 4,500 dollars. The witness failed in 1816, until which time he was able to pay his debts, and was able to pay the note in question long after it fell due. On being questioned as to the manner in which he paid the sum mentioned to *Powell & Co.*, the witness said, that his brothers were sureties for him, and two hundred acres of land, of which he was in possession, were conveyed to them by his father, at the request of the witness, which they then mortgaged to *Powell & Co.*, for the debt.

The attorney testified that the plaintiffs put the note in question into his hands, for collection, in *June* or *July, 1815*; the witness did not demand payment of the defendant until *December* following; and the note not being paid, he commenced a suit in that month. *Wood* was then solvent, though there were large demands against him. His instructions were to receive the joint bond of *Wood* and the defendant, if they offered it, payable in one year. He delayed commencing the suit, in consequence of the repeated promises of *Wood*, to get the bond executed, which was the *only security mentioned. He saw and conversed with *Wood* only, and supposed that he

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communicated the proposals to the defendant, with whom he was intimate.

The defendant offered to prove what a witness had sworn, on a former trial, between the same parties, on this note, as to the usury alleged, which, being objected to, was overruled.

A verdict was taken for the plaintiffs, for 1,940 dollars and 29 cents, subject to the opinion of the court, on a case containing the facts above stated.

The case was submitted to the court, with the points and authorities, without argument.

SPENCER, Ch. J., delivered the opinion of the court. The material points in the cause are, whether the note in question was fraudently put into circulation? whether the plaintiffs are *bona fide* holders of it? and whether the confession of one of the plaintiffs, that the note was usuriously discounted, was admissible evidence? There is no force in the objections, that the indulgence granted by the plaintiffs to *Wood*, discharged the defendant, or as to the overruling the proof, of what a witness had sworn on a former trial, as to usury in the transaction. It is decisive, as to these points, that mere delay to sue does not affect the rights of the creditor even against a surety; and that to entitle a party to give in evidence the testimony of a witness on a former trial, it must be shown, that the witness is dead; and this was not shown or pretended. (a)

The note in question was a renewal of one which had been drawn by *Wood*, and endorsed by the defendant. The first note was intended to be discounted at the *Newburgh* bank, but was discounted by the plaintiffs; and it appeared, by the testimony of *Smith*, an endorser of the note, subsequent to the defendant's endorsement, that the present note was delivered to him by *Wood*, endorsed by the defendant, without any directions or instructions from either, in what manner he was to negotiate it, though it was well understood by *Wood* and the defendant, that with the avails he was to take up the original note. Independently of the question of usury, there is nothing in the objection; the *first note was made and endorsed to raise money on. and it was entirely immaterial whether it was discounted at the *Bank of Newburgh*, or elsewhere. It did not alter or increase the responsibility of the endorser; the money to be raised was intended to be for the benefit of *Wood*, and he did receive the money for which the first note was discounted. If the plaintiffs knew, when they received the note, that it was intended to be discounted at the *Bank of Newburgh*, and had been refused, it would not affect them, or establish any fraud.

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(a) What one swore on a former trial, cannot be given in evidence unless he be dead. That he is beyond the reach of process of subpoena, and cannot be found on diligent inquiry, will not render such proof admissible. *Wilbur v. Seiden*, 6 Cowen, 162.

Smith, the second endorser of the note, and the person who had procured the plaintiffs to discount the first note, and had negotiated the note in question to them, to take up the first note, was asked, whether *Jacob Powell*, one of the plaintiffs, had not, since the note was discounted, admitted to him, that it was usuriously discounted. This question was objected to by the plaintiff's counsel, and overruled.

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The situation in which *Smith* stood did not incapacitate him from testifying to that fact. He was not asked any question involving his own turpitude, as whether the note which he passed as a good and available note, was void within his knowledge, when he offered it to the plaintiffs, and that I consider to be the precise point on which a majority of this court, in *Winton v. Saidler*, (3 Johns. Cas. 185.) (a) rejected the testimony of an endorser. The reasoning of Mr. Justice *Thompson*, who delivered an opinion on that side of the question, proceeds on the maxim, that *nemo allegans suam turpitudinem est audiendus*; he considered it as contrary to sound policy and morality, that a party to a negotiable note should be admitted as a witness to invalidate it; meaning, undoubtedly, to be understood, that a person whose name was on a negotiable paper, and who had thereby contributed to its circulation, should not be heard to say, that the paper, thus sanctioned by his name, was tainted when it passed from his hands. But if it receives its taint when it is negotiated to the party plaintiff, by the facts then happening, it is not contrary to public policy or morality, nor would it come within the principle of the decision of *Winton* and *Saidler*, to hear the witness as to such facts, if there were no other objections to his testifying. *If the plaintiffs discounted the first note upon a usurious consideration, and the note in question was a mere substitute for that note, they are not entitled to object to the evidence, that they themselves were guilty of usury, because *Smith*, whose name was on the note, was the agent of *Wood*, in making the usurious bargain. The principle in *Winton* and *Saidler* was intended as a protection for the fair and *bona fide* holders of a negotiable note or bill against any prior transaction, which had already invalidated the paper, so far as regarded any person who had, by endorsing the paper, or putting his name to it, as a party, from being a witness to impeach it. The case of *Skelding v. Light* (15 Johns. Rep. 275.) is in point to show that a party, whose name is on a negotiable paper, may be permitted to testify as to any facts which arise subsequent to the signature of the witness. Upon authority, then, *Smith* was a good witness to prove the usury by the plaintiffs, in their acquisition of the note. (b)

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(a) Vide *Stafford v. Rice*, 5 Cowen, 24.

(b) Vide *M'Fadden v. Maxwell*, post, 188. *Myers v. Palmer*, 18 Johns. Rep. 167. *Tuthill v. Davis*, 20 Johns. Rep. 233. *Stafford v. Rice*, 5 Cowen, 22. *Utica Bank v. Hillard*, *Ibid.* 153. *Baskins v. Wilson*, 6 Cowen, 471.

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It may, however, be urged, that the purchase of the note by the plaintiffs, at such a discount as would amount to usury, in case the note was originally intended to be sold to them, is not, under the circumstances, usurious, and in fact that it was the mere purchase of the note at a less sum than its face. The case of *Munn v. The Commission Company* (15 Johns. Rep. 55.) settles this point. It is there said, that if a bill or note be made for the purpose of raising money, and it is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted, that then such discounting the bill would be usurious, and the bill would be void. In the present case, the note was endorsed for the accommodation of *Wood*, and it was not an available paper in the hands of either the payee or endorser, until it had been negotiated to the plaintiffs, and the transaction, therefore, would be usurious, if the plaintiffs purchased the note at a less sum than its nominal amount, deducting the interest for the time the note had to run.

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It certainly was an extraordinary question which was put to the witness, whether one of the plaintiffs had not admitted to him, since the note was discounted, that it was usuriously discounted; for *Smith*, being the person who transacted the business, would himself know the fact. Still, however, I perceive nothing improper in the question; his answer may have shown the relevancy and propriety of the inquiry; and it is not to be supposed that the question would have been entirely overruled, but under the idea that *Smith*, being an endorser, would not be permitted to testify at all to the usury. Had not that idea prevailed, the question would have been so shaped by the judge, as to elicit all that the witness knew on the subject. We, therefore, grant the motion for a new trial, with costs to abide the event of the suit.

New trial granted.

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An endorsement on a bond or note made by the obligee or promisee, without the privity of the obligor or promisor, is not admissible evidence of a pay-

ment, in favor of the party making the endorsement; so as to repel the presumption of payment arising from the lapse of years, or to take the case out of the statute of limitations, unless it be first shown, that it was made at the time of its date, or when its operation would be against the interest of the party making it; and then, on such proof being given, it is good evidence for the consideration of the jury.

The defendant pleaded *non assumpsit*, and *actio non accrevit infra sex annos*, to which the plaintiff replied, and took issue thereon.

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The cause was tried on the 10th of June, 1818, and the plaintiff, after proving the making of the note by the defendant, offered to prove an endorsement on the note, in the hand-writing of the plaintiff, dated October 18th, 1811, acknowledging the receipt of thirty dollars, in part payment of the note. This evidence was objected to by the defendant's *counsel, and overruled by the court. The plaintiff thereupon tendered a bill of exceptions, which was signed and sealed by the court, on which the writ of error was brought. The jury found a verdict for the defendant, on both issues, on which the court below gave judgment.

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Conkling, for the plaintiff in error, contended, that the evidence offered by the plaintiff of an endorsement on the note, within six years last past, was admissible, though not conclusive, and ought to have been left to the jury. The statute says, that a lapse of six years shall afford a presumption of payment; but the plaintiff is not precluded from showing circumstances to repel this legal presumption. In the case of *Searle v. Barrington*, (2 Str. 826. S. C. 8 Mod. 278. S. C. Lord Raym. 1370. S. C. 3 Bro. P. C. 593.) the defendant pleaded *solvit ad diem*, in an action on a bond, and relied on the presumption arising from the lapse of 28 years from the date of the bond, in support of the plea. To repel this presumption, the plaintiff offered in evidence two endorsements of the payment of interest, on the bond, one of which was within twenty years, and this evidence, after argument, was held admissible. This case underwent much discussion, and was finally affirmed in the House of Lords. In *Glynn v. The Bank of England*, (2 Vesey, 39—42.) Lord Hardwicke recognizes the doctrine established in this case. Mr. Phillips, (*Treat. on Evid.* 117.) in commenting on the case, states as a fact, that the obligee died 13 years after the date of the bond. This is a mistake; it was the obligor who was dead.

Cady, contra. The cases cited are those of bonds, where a presumption of payment arises from the lapse of time merely; and are not applicable to the case of promissory notes, where the statute runs from the time the right of action accrues, and creates a positive bar. The effect of the doctrine contended for, on the other side, would be a virtual repeal of the statute; for if the payee or holder of a note can, at any time, by making an endorsement of a payment of interest, or a part of the principal, create evidence for *himself, to take the note out of the operation of the statute, it will be in vain for the defendant to rely upon it.

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Conkling, in reply. The plea is, that the plaintiff's right of action did not accrue within six years. On this issue, it is enough for the plaintiff to show an acknowledgment of the right within six years. All the cases show that what would be sufficient to repel the legal presumption in the case of a bond, is enough to take a note out of the statute. It is not like setting up presumption to support a right. It is merely letting in one presumption of law, to repel another presumption. It is evidence for the consideration of the jury, and ought to be received, subject to the direction of the judge. There is no danger, in such case, in permitting the evidence to go to a jury, with the qualification laid down by Lord *Ellenborough*, in *Rose v. Bryant*; (2 *Campb. N. P.* 321.) that before admitting the endorsements as evidence, the plaintiff must first prove that they were made at, or recently after, the times when they bear date, when the effect of them was clearly against the writer's interest. The mode of declaring on the original promise, and relying on a subsequent promise or acknowledgment of the defendant to take the case out of the statute, on a plea of *actio non accrevit infra sex annos*, is the settled and approved form of pleading. (*Leaper v. Tatton*, 16 *East*, 420.)

SPENCER, Ch. J., delivered the opinion of the court. The question here is, whether an endorsement of a payment on a promissory note, in the hand-writing of the payee, without any other evidence of the fact of payment, ought to have been submitted to the jury, as proof of the payment, and thereby to take the case out of the operation of the statute of limitations.

The case of *Searle v. Lord Barrington* has been much relied on, as deciding this point. (2 *Str.* 827. 2 *Lord Raym.* 1370. S. C. 8 *Mod.* 278. S. C. 3 *Bro. P. C.* 393. 535 S. C.) The action was on a bond, stated in *Strange* to be dated in 1697, and in *Raymond*, in 1695. The plea was *solvit ad diem*; the defendant relied on the presumption of payment from the lapse of time; to repel which the plaintiff *produced the bond, with two endorsements, under the obligee's hand, of receipts for interest, the one in 1699, and the other in 1707. *Pratt*, Ch. Justice, being of opinion, that these entries, under the obligee's hand, who had the bond in his custody, and might enter what he pleased upon it, could not be evidence for him, nor for his administrator, though they would have been good evidence against him, refused to admit the evidence. Upon debate, the other three judges were of opinion, that it ought to have been left to the jury, for they might have reason to believe, that it was done with the privity of the obligor, and that the constant practice was for the obligee to endorse the payments of interest. A new action was brought, and Chief Justice *Raymond* suffered the endorsements to be read, and

the jury found for the plaintiff. A bill of exceptions being taken, a writ of error was brought to the Exchequer Chamber, where the judgment was affirmed. Afterwards, a writ of error was brought to the House of Lords, and the judgment was there affirmed. *Brown's* report of the case gives a fuller statement of the evidence than the other reporters: It is there stated, that the chief justice held, that the endorsements were evidence to be left to the consideration of the jury; "and other circumstantial evidence being given to induce the jury to believe the bond was not satisfied," there was a verdict for the plaintiff. Lord *Hardwicke*, speaking of this case, (2 *Ves. sen.* 43.) says, "in that case, he takes it, the endorsements were made and bore date within the 20 years, for if those endorsements were dated after the expiration of 20 years, though they were evidence of the actual payment of interest after that time, they would not be evidence to take it out of the presumption." *Phillips*, in his *Treatise on Evidence*, (117.) comments on this case, and in endeavoring to reconcile the decision with his view of the law, asserts that it was proved that the obligee who made the endorsements died about thirteen years after the date of the bond. In the case of *Rose v. Bryant*, (2 *Campb.* 321.) the plaintiff offered, for the purpose of meeting evidence of direct payment, to read endorsements on the bond, acknowledging the receipt of interest and part of the principal, not in the defendant's handwriting, nor did it appear when they were written, or *that they existed during the intestate's life time. Lord *Ellenborough* decided, that it must be proved, that the endorsements were on the bond at, or recently after, the times they bore date. Although, he observed, it may seem, at first sight, against the interest of the obligee to admit part payment, he may, thereby, in many cases, set up the bond for the residue. If the fact stated by *Phillips*, that in *Searle v. Barrington*, it appeared that the obligee died about thirteen years after the date of the bond, be correct, the principle of that decision could never have been questioned. The endorsements would have been against the interest of the obligee, and being made when no improper motives of gain could have existed, it would come within the rule mentioned by Lord *Ellenborough*; for they must have been made before the presumption of payment, from lapse of time, attached. But Mr. *Phillips* does not mention where or how he ascertained this important fact, and as none of the four reporters of the case notice so controlling a circumstance, I must be permitted to doubt its accuracy; especially, as it is not conceivable that the cause would have been so severely contested, had that fact existed. (a) There

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(a) It would seem, from the manner in which Mr. *Phillips* states the case, (p. 115.) that he had before him, at the time, the report of it by *Strange*; but it is there stated, that the bond was dated the 24th of June, 1697, and that, on the trial of the cause, "the plaintiff offered to give in evidence an endorsement of

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is one circumstance stated by *Brown*, in his report of the case, *which distinguishes that case from this. It appeared that other circumstantial evidence was given, to induce the jury to believe that the bond was not satisfied. What that evidence was, we are left to conjecture. The utmost, however, that was decided was, that the endorsements were evidence to be left to the consideration of the jury.

Since that period, the distinct and independent provinces of the court and jury have been much better understood. The courts, now, very properly decide how far the evidence is pertinent and proper, before it is submitted to a jury; and if it be inconclusive and impertinent, it is rejected, lest it might produce an improper bias on the minds of the jury. It is a fundamental principle, that the private, *ex parte* acts of an individual shall not be evidence for him, unless those acts were in collision with his interest at the time. To admit evidence of the party's own creating, I consider repugnant to every sound principle of law. Declarations by a party in his own favor never can be admitted; and wherein consists the difference between his declaration that he had received a partial payment and his written acknowledgment of such payment? They are liable to the same objection, as coming from an interested source. Here the endorsement on the note was favorable to the plaintiff's interest, for he thereby repels the operation of the statute of limitations, and recovers the balance, whereas, without such endorsement, the demand would be barred.

An endorsement, therefore, on a bond or note, made by the obligee or promisee, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making such endorsement, unless it be shown that it was made at a time when its operation would be against the interest of the party making it. If such proof be given, it would, I think, be good evidence for the consideration of the jury.

Judgment affirmed.

interest, under the hand of the obligee, in the year 1707, which was three years before the death of the obligor." The *obligor*, then, must have died in 1710, or 13 years after the date of the bond; and Mr. Brown, who gives the same date to the bond, says, expressly, that the *obligor* died in April, 1710. As none of these reporters mention when the obligee died, the first impression would be, that the word *obligee*, in this page of the treatise of Mr. P., was an error of the press, did he not, in page 117, where he remarks, that there ought to be some extrinsic evidence to prove that the endorsement was made within the 20 years, add, that "such evidence was produced in that case, it being proved that the obligee who made the endorsement died 13 years after the date of the bond." That he was, in fact, dead is certain, as the suit was brought by his widow, as *administratrix*, as stated by *Raymond*, or as *executrix*, as mentioned in 8 *Mod.*, where the case first appears; and where it is also mentioned, as a circumstance proved to the jury, that the bond was found among the papers of the testator, after his death, and that he was esteemed an honest man.

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October, 1819.*M'FADDEN *against* E. MAXWELL.M'FADDEN
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THIS was an action of *assumpsit*, tried at the *Rensselaer* circuit, in *December*, 1818, before Mr. Justice *Spencer*.

The action was on a promissory note, dated *August* 10th, 1816, made by the defendant for 600 dollars, payable six months after date, to *Anthony L. Maxwell*, or bearer, and by him endorsed to the plaintiff. At the trial, the defendant offered *A. L. Maxwell*, the payee and endorser, as a witness to prove that the note was given to him by the defendant, upon condition that, if the defendant should take a quantity of merchandise from the said *A. L. Maxwell*, then the note was to be valid, otherwise it was to be void and to be returned to the maker; and that the plaintiff, at the time he received the note for *A. L. Maxwell*, was informed of the condition on which the note was given; but this evidence being objected to by the plaintiff, the witness was, at first, rejected by the judge; but he was admitted, afterwards, on its appearing from evidence, subsequently produced, that the plaintiff held the note as a trustee for him. The defendant then called the subscribing witness to the note, who stated that the defendant had been in treaty with *A. L. Maxwell*, for the purchase of all the goods in his store, and that the note in question, and two other notes, each for the same amount, were made by the defendant, and delivered to *A. L. Maxwell*, upon condition that if the defendant should, after consulting his father, conclude not to take the goods, then the notes were to be null and void, and returned to the defendant. The defendant, also, gave in evidence the following receipt: "Six months after date, for value received, I promise to pay *A. L. Maxwell*, or order, one hundred and eighty-seven dollars, if the note of his in my hand, endorsed *by him is paid me; and if not, to be valid and of no use as an agreement, as witness my hand the 10th day of *August*, 1816. *Michael M'Fadden*."

The plaintiff then offered to prove that the note on which this action was brought was endorsed to him by *A. L. Maxwell*, to secure the payment of 213 dollars, owing to the plaintiff from *A. L. Maxwell*, and that he gave the receipt, or note above mentioned, for 187 dollars, for the excess of the note endorsed, beyond the debt due to him, and as a memorandum that *A. L. Maxwell* was interested in the note to that amount, and no more. This evidence was objected to, on the ground that it would contradict the receipt, and it was excluded by

A promissory note for 600 dollars, payable in 6 months, was given by the defendant to *M.*, with an agreement between them, that, if the defendant did not take certain goods of *M.*, the note was to be void and returned; and *M.*, on the same day, without the knowledge of the defendant, endorsed the note to the plaintiff, to secure a debt of 213 dollars, and the plaintiff gave a receipt to *M.*, of the same date, promising to pay to him 187 dollars, in six months, if the note was paid, and if not, then the agreement was to be void; the defendant gave due notice to *M.* that he should not take the goods; and the note not being paid, the

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plaintiff, as endorsee, brought an action against the defendant, the maker: *Held*, that *M.*, the endorser, was a competent witness for the defendant, to prove the consideration on which the note was given, and of its having failed, and that

the plaintiff was informed, at the time of the endorsement to him, of those facts: *First*, because, by the agreement between *M.* and the plaintiff, the whole transaction was void, on the note not being paid, and which ought to have been returned to *M.*; and, *secondly*, because *M.* was not called to prove the note void at its inception, but to show that it became so, by the subsequent determination of the defendant not to take the goods, and that the plaintiff had notice of the condition on which the note was given.

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the judge, who then stated that the defendant having shown, by the receipt above mentioned, that the plaintiff held the note in question as a trustee for the endorser, *A. L. Maxwell* might be admitted as a witness to show the consideration upon which the note was given. The witness was then called, though objected to by the plaintiff, and stated the terms and conditions on which the note in question, and the other two notes, were given, as before testified by the subscribing witness; and that the defendant, after consulting with his father, gave notice to the witness, a few days after the execution of the note, that he declined taking the goods; that the same were not removed from the store of the witness, and that the defendant never received them, nor any other consideration for the note. The witness returned the other two notes; but did not inform the defendant what he had done with the note in question. That at the time he endorsed the note in question to the plaintiff, and took the receipt from him for 187 dollars, as evidence of the balance which would be due to the witness, if the note was paid, he informed the plaintiff of the condition on which the note was given.

A witness for the plaintiff, who was present when the note was endorsed by *A. L. M.* to the plaintiff, stated, that he heard nothing said of any condition on which the note was given; and that the defendant was a brother of *A. L. M.* Another witness testified, that *A. L. M.*, in conversation, said, that he did not inform the plaintiff, at the time of *endorsing the note to him, of the condition on which it was given.

A verdict was taken, by consent, for the plaintiff, for the 213 dollars, with interest, subject to the opinion of the court on the question, as to the competency of *A. L. M.*, the witness, to prove the facts testified by him as to the note; and it was agreed, that if the court should be of opinion, that he was not competent, then judgment was to be entered for the plaintiff, on the verdict; but if the court should be of opinion, that he was a competent witness, then a judgment of nonsuit was to be entered.

The case was submitted to the court, on the points stated by the counsel, without argument.

SPENCER, Ch. J., delivered the opinion of the court. This case presents the sole question, whether *A. L. Maxwell* was a competent witness, under the circumstances of the case, to prove, that the note in question was given on a consideration which failed, and that the plaintiff was informed of that fact when he took it, the witness having endorsed the note to the plaintiff.

The objection now, also, taken, that he was interested, as regards the costs of the suit, ought not to be discussed, for that objection was not made at the trial; if it had been, it

would, undoubtedly, have been obviated by a release of any claim to costs.

It is clear, that the witness stood indifferent between the parties. If the plaintiff recovered, he would have been answerable to the defendant for the amount; if the plaintiff failed, he remained answerable to him for the amount claimed in this suit. The objection, then, is confined to the mere circumstance of his being an endorser, called upon to invalidate a note to which he had given currency, by showing that it was without consideration, and that the plaintiff was apprized of that fact when he took it.

It struck me, at the trial, that the promissory receipt given by the plaintiff, on the 10th of *August*, 1816, showed, that the plaintiff received the defendant's note as a collateral security, and that the plaintiff was a mere trustee for the witness. *It is evident that he was so to the amount of 187 dollars.

The note in question, and the written stipulation given by the plaintiff to the witness, bear the same date. The note was payable in six months, and the engagement made by the plaintiff to the witness, is to pay the 187 dollars to the witness in six months, if the note was paid to the plaintiff; if not, then the agreement was to be void, though the paper states that it was to be valid, and of no use as an agreement, but evidently meaning, that it was to be void. If the agreement was to be void, as regarded the witness, the whole transaction was to be annulled, and the plaintiff would be bound to re-deliver the note; for what right had the plaintiff to retain the note, if he was not to be answerable to refund to the witness the surplus of 187 dollars beyond what was due from the witness? I now consider the agreement, after full consideration, as avoiding the whole transaction. The substance of the transaction is this: the witness, being indebted to the plaintiff, lodged this note in his hands as a collateral security, on condition that, if the note was duly paid, the witness should receive 187 dollars of the money, but if not, then the whole agreement was to be null; and, as a necessary consequence, the witness was to have the note re-delivered to him. If this is a just exposition of the agreement, then the retaining the note by the plaintiff, and attempting to enforce it, was a violation of the agreement; but, in another view of the case, I am satisfied that *Maxwell* was a competent witness. The note was to take effect, or not, by the agreement or disagreement of the defendant to perfect the contract for the witness's goods in his store. The witness was not testifying to any fact which showed that the note was void in its inception, but that it became so by the determination of the defendant not to take the goods; and this fact being communicated to the plaintiff, he took the note subject to that condition. In the case of *Skelding and Haight v Warren*, (15 *Johns. Rep.* 270.) we decided, that a party to a negotiable note might testify as to any facts subsequent to its

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execution, that is, to the signature of the note. The plaintiff did not take this note in the usual course of business; he retained his pre-existing demand *against the payee; he took it only as a collateral security for part of the amount.

Judgment of nonsuit. (a)

(a) *Vide Powell v. Waters, ante, p. 176, and p. 179, note.*

ZIELLY against WARREN.

In an action of debt to recover back money paid by the plaintiff to the defendant on a wager between them, on a horse race, under the act, (sess. 25. ch. 44. 1 N. R. L. 223. 1 Rev. Stat. 672. and sess. 24. ch. 46. §. 2 and 3. 1 N. R. L. 452.) the plaintiff is entitled to recover no more money than the defendant has actually gained by the event of the race; though the contract was made between the plaintiff and defendant for the whole sum bet, being a much larger sum, on each side, and which was, therefore, nominally won by the defendant; but with whom other persons were, in fact, concerned, and contributed to make up the sum, and had [* 193] received their proportions of the money won.

THIS was an action of *debt* brought by the plaintiff to recover 150 dollars, bet between the parties on the event of a horse race, under the 5th section of the act to prevent horse racing, &c. (1 N. R. L. 223. sess. 25. ch. 44. 1 Rev. Stat. 672.) which declares, that all contracts made, or sums of money or other thing staked or bet on any such race, &c., or on account of any gaming by lot or chance of any kind, shall be void; and that it shall be lawful for any person who may have paid any money or other thing on the issue of any such race or game, to recover the same, in like manner as provided in the second and third sections of the act to prevent excessive and deceitful gaming; (sess. 24. ch. 46. 1 N. R. L. 152. 1 Rev. Stat. 663. § 16.) the second section of which act declares, that the party losing above 25 dollars, in money or any other thing, and who shall have paid or delivered the same, or any part thereof, may, within three months thereafter, sue for and recover the money or value of the things so lost and paid or delivered, or any part thereof, from the winner, with costs of suit, by an action of debt, &c.

A witness for the plaintiff testified, that the plaintiff and defendant, on the 29th of October, 1818, made an agreement to run their respective horses, for a purse or stakes of 300 dollars, or 150 dollars a-side, and the plaintiff deposited in the hands of M. D., the stakeholder, 130 dollars in cash, and a watch valued by the parties at 20 dollars. The defendant's horse won the race; and a witness stated, that the defendant, within an hour after, said he had received the stakes and the money which the plaintiff had deposited; and had agreed to run the race over again for double the amount.

*It was admitted that the action was brought within three months.

The defendant offered to prove that other persons were interested in the bet, and had contributed money to make up the purse of 150 dollars, on the side of the plaintiff; but this evidence being objected to, was overruled by the judge.

R., a witness for the defendant, testified, that he was present at the race, and that after the race was won by the defendant's horse, *M. D.*, the stakeholder, said he was going away, and could not hold the stakes longer; and he gave to the witness 280 dollars in money, in two parcels, one containing 150 dollars, and the other 130 dollars, and a gold watch. The witness retained 60 dollars, part of which belonged to him, and the residue of that sum to others, to whom he paid it; the remainder of the stakes he gave to **G.** The witness calculated the defendant's proportion of the 130 dollars, which was 34 dollars and 66 cents. The plaintiff's counsel objected to the evidence, that other persons contributed to make up the defendant's 150 dollars, but the objection was overruled by the judge.

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G., a witness for the defendant, testified, that the agreement to run the race, for a bet of 150 dollars each, was made between the plaintiff and defendant, about ten days before the race actually took place, and that each deposited, at the time, 30 dollars, to bind the contract, which sum was taken up, when the 150 dollars on each side was made up, and deposited with *M. D.*, the stakeholder: That the witness and several others were concerned with the defendant in the bet, which fact was known to the plaintiff. That after the race was over, the witness received part of the money staked from **R.**, and distributed it among the winners, but he did not recollect how much each one received, nor how many persons were concerned. That the plaintiff said to the stakeholder, "they have won the money fairly: give it to them." The watch was retained in the hands of the witness, until the plaintiff should redeem it, which he had not done.

A verdict was taken for the plaintiff, for 150 dollars, subject to the opinion of the court, on the question, whether the amount should not be reduced to 34 dollars and 66 cents. The case was submitted to the court without argument.

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SPENCER, Ch. J., delivered the opinion of the court. The only question arising on the case, is whether the plaintiff is entitled to recover 150 dollars or 34 dollars and 66 cents? This depends on the construction to be given to the 5th section of the act to prevent horse-racing, (1 *N. R. L.* 223. 1 *Rev. Stat.* 672.) and the second and third sections of the act to prevent excessive and deceitful gaming. (1 *N. R. L.* 153. 1 *Rev. Stat.* 662. § 16.) The fifth section of the first act declares every contract on account of any sum of money, or other thing, bet or staked, or depending on any horse-race, to be void in law; and it authorizes *any person who may have paid any money, or other thing, upon the issue or event of any such race or game*, to recover the same, as is provided in the second and third sections of the act to prevent excessive and deceitful gaming. The second section of the act referred to

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authorizes every person who shall lose to any one or more persons so playing or betting, and shall pay or deliver the same, within three months next thereafter, to sue for and recover the money, or value of the thing so lost and paid and delivered, *from the winner*, with costs, by action of debt. Was the defendant the winner of the whole 150 dollars, or of that part only which he contributed towards the purse? It appears that the plaintiff and defendant alone made the bargain to run the race, for a purse of 300 dollars, to wit, 150 dollars on a side. They, ostensibly, were the only persons who furnished the money, and deposited it in the hands of the stakeholder. It further appears, that the plaintiff knew, that several persons had contributed towards the bet on the defendant's side; but it does not appear that he knew who they were.

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It seems to me that the defendant cannot be considered the winner of any more than the sum he actually gained by the event of the wager; no more ever came into his hands; the object of the statutes is to subject those who shall bet upon horse-racing to punishment, criminally, and, also, to avoid the contract, and place the parties in *statu quo*, as to all the moneys won or lost on the race. Nominally, the defendant won the 150 dollars furnished by the plaintiff, but, *in point of fact, he won only 34 dollars 66 cents. Both parties stand in *pari delicto*; neither have a claim to any peculiar favor or indulgence of the court; and if the defendant is compelled to refund his gains, it is all the plaintiff has a right to demand. In the case of *Visscher v. Yates*, (11 Johns. Rep. 23.) this court looked beyond the mere form of laying the wager, and recognized the rights of those who had contributed to the fund, although they were not the ostensible persons who made the contract, or furnished the money to make the deposit.

Judgment for the plaintiff for 34 dollars 66 cents.

THE PEOPLE *against* PLATT and others.ALBANY,
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THE defendants were indicted for a *nuisance*, at the General Sessions of the Peace, for *Clinton* county, in *January*, 1818. The indictment contained three counts. The first count stated, that the river *Saranac* runs through the county of *Clinton*, and empties into *Lake Champlain*, and that, before the nuisance complained of, *salmon* were accustomed to pass, and did actually pass, from *Lake Champlain* into and up the river *Saranac*, for a distance of twenty miles; that by the laws and statutes of the state, it is made unlawful for any person or persons to erect any dam or other obstruction *along, across, in and over the said river, in such manner as to obstruct the course and passage of the fish, to wit, *salmon*, out of *Lake Champlain*, into, up, and along the said river, to the distance of twenty miles. That on the 1st of *January*, 1817, and at divers other days, &c., the defendants, disregarding, &c., erected and built, and continued a dam, over, along, and across the said river, in the town of *Plattsburgh*, near to the entrance of the said river into *Lake Champlain*, in such a manner as to obstruct the passage of *salmon* out of *Lake Champlain*, into, up, and along the said river, for the distance of twenty miles, &c., to the evil example, &c., contrary to the statute in such case made, &c. The second count stated that, from time immemorial, the *Saranac* has run through the county of *Clinton*, and town of *Plattsburgh*, and emptied into *Lake Champlain*, and that before the nuisance complained of, *salmon* were accustomed to pass, and did actually pass, from *Lake Champlain*, into, and up the *Saranac*, for a long distance, and above the nuisance complained of, to wit, 20 miles; and that on the 28th of *March*, 1800, there was, and for a long time before had been, a mill dam across the said river, near its mouth, to wit, within sixty rods, which dam was constructed in such a manner, as wholly to obstruct, and did obstruct the usual course of *salmon* coming up the said river; and that on the 1st of *October*, 1801, and from the 28th of *March*, 1800, and for a long time before and since, continually to the present time, the said mill dam was not constructed, or altered, by making a slope thereto, not exceeding 45 degrees, and planking the same in such smooth manner, that *salmon* might easily pass over into the

By the patent granted to *Zephaniah Platt*, in 1784, of a tract of land bounded east on *Lake Champlain*, and extending west, on both sides of the river *Saranac*, seven miles square:

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the whole river, to that distance, passed to the patentee, and became his exclusive property, there being no reservation of the river, nor any restriction in the use of it expressed in the grant; and the public have no right of fishery in it, within the bounds of the patent, it not being a navigable river. The erection of a dam, therefore, by the patentee, in 1786, near the mouth of the river, by which *salmon* are prevented from passing up the river from the lake, is not indictable, as a public nuisance, either at the common law, nor under the statute for the preservation of fish in certain waters, passed the 3d of *April*, 1801, (1 K. & R. L. 420. sess.

24. ch. 127.) and re-enacted *April* 5th, 1813, (2 N. R. L. 238. 36 sess. ch. 62. sect. 3. 3 Rev. Stat. 318.) which required the owners of mill or other dams, which, on the 28th of *March*, 1800, were made across any river or creek running into *Lakes Ontario*, *Erie* or *Champlain*, so as to obstruct the usual course of *salmon* in going up those rivers and creeks, to alter their dams, by making slopes to them, in the manner prescribed, so that *salmon* might freely pass over the dam.

Those statutes ought to be construed with an implied exception of such rivers or streams (not being navigable) as had been fully, and absolutely, granted by the state, without any reservation, or limitation in the use of them.

And those statutes, so far as they affect the rights of *Z. Platt* and his assigns, to the absolute and exclusive enjoyment of the *Saranac*, within the bounds of the patent to him, or impair the obligation of the contract, are unconstitutional and void.

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waters above the dam, nor by removing the obstruction of the said dam, in any other manner, so that salmon might freely pass into the waters above the dam; but the said dam remains, &c. And that the defendants, on the 28th of *March*, 1800, and since to the present time, have possessed, repaired, and kept and supported the said dam across the said river, so as wholly to obstruct the usual course of the salmon, &c. The *third* count stated, that before the nuisance complained of, and for time immemorial, salmon were accustomed to pass, and did actually pass, out of the *Lake Champlain*, into, and up the said river, &c. That since the 28th of *March*, 1800, *there had been a dam across the *Saranac*, &c., and which had not been constructed, or altered by making a *slope*, &c., so that the salmon might pass above it, &c. And that the defendants, on the 1st of *May*, 1816, had possessed, repaired, and constantly kept up the said dam, in such manner as wholly to obstruct the passage of salmon up the said river, &c.

A great number of witnesses were examined on the trial of the indictment. It appeared, that in 1784, the country through which the *Saranac* runs was wild and uninhabited; and a patent for a tract of land, dated the 26th of *October*, 1784, was granted to *Zephaniah Platt*, which is bounded on the east by *Lake Champlain*, and extending west, on both sides of the *Saranac* river, being seven miles square. This patent contained no other exception or reservation, except those of "all mines of gold and silver, salt lakes, springs and mines of salt, and carrying places upon any water communications, which may be found or contained within the limits of the said land, and two small tracts for the use of a minister of the gospel, and a public school." It was admitted, that the defendants derived a regular title to the mill property, with its appurtenances, including the dam, pond, and the land on both sides of the *Saranac*, under this patent. The first dam erected by the patentee was in 1785 or 1786; and at that time there were but two or three inhabitants above the dam. The patentee exercised exclusive acts of ownership over the river and its waters where the mill, dam and pond now are, from the time the first dam was erected; and the subsequent proprietors and possessors under him have continued to exercise the same ownership. The *Saranac* rises in the *Highlands*, near the head waters of the *Hudson*, and runs nearly east, until it empties into *Lake Champlain*, near *Cumberland* bay. It is a rough, rapid, and shallow stream, with a rocky bed, until it approaches the town of *Plattsburgh*. There is a fall of water about three miles above the mills, of about 15 feet, called "*Vredenberg Falls*;" and another fall, about 7 miles from the *Lake*, called the "*Great Falls*." The river is not navigable for any kind of boats or craft; and no timber was floated down the river until about the year 1810, and the defendants received compensation *for the privilege of floating it. No

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rafts of timber, or *cribs*, can be floated down the river, but only single pieces, or saw-logs, and that only during freshets, or two or three times in the year; and even then it is attended with so much difficulty, that transportation by land is generally preferred.

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Before the dam was erected, in 1786, salmon were seen above it; and, after it was built, many were caught at the foot of the dam, but none above it. In 1797, the old dam was pulled down, and a new one erected about 40 rods below it. In 1801, within the time required by the statute, a sluice way or *slope* was erected for the purpose of enabling salmon to ascend the dam into the river above; but, on account of the shallowness of the water, they have never been able to ascend; and the number which used to appear had greatly diminished. Salmon begin to ascend the river from the lake, in *June* and *July*, but most in *August* and *September*. The timbers of the sluice way or slope, are about forty feet long, and the dam is about 14 feet high. The elevation of the sluice is about 30 degrees; and it could not be altered or so constructed as to permit salmon to ascend above it, without injuring the mills.

A verdict was entered, by consent, for the defendants, subject to the opinion of this court, on a case made, which either party might turn into a special verdict; and that all proceedings should be removed into this court, and such judgment be entered as the court might direct.

Sperry, for the plaintiffs. By the last section of the act for the preservation of salmon in certain rivers running into lakes Ontario, Erie, and Champlain, passed the 28th of March, 1800, (sess. 23. ch. 74.) it is enacted, that "the owners of mill dams or other dams, now erected or made across any of the said rivers or creeks, or across any river or creek running into lakes Ontario, Erie, or Champlain, so as to prevent the usual course of the salmon from going up the said rivers or creeks, shall, within eighteen months from the passing of this act, so alter such mill dam or other dam, by making a slope thereto not exceeding forty-five degrees, and planked in such smooth manner that salmon may easily pass *up over into the waters above the dam, or by removing the obstructions of such dam, in any other manner, so that salmon may freely pass into the waters above the dam, on penalty of 200 dollars, &c.; and in case such mill dam, or other dam, shall not be so altered, as aforesaid, within the time above mentioned for that purpose, such mill dam, or other dam, shall be deemed a public nuisance, and, as such, shall be removed in like manner as public nuisances are by law removed." This section was re-enacted, on the revision of the laws in 1801, (1 K. & R. L. 422. sess. 24. ch. 127.) and the same act is to be found in the last revision of the laws in 1813. (2 N. R. L. 238. sess. 36. ch. 61. s. 3. 3 Revised Statutes, 318.)

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Independent of this statutory prohibition, on principles of the common law, the defendant had no right to obstruct the passage of fish up the river. In *Shaw and others v. Crawford*, (10 Johns. Rep. 236.) this court laid down this principle, that "every owner of a mill dam on a stream which fish from the ocean annually visit, is bound to provide a passage way for the fish to ascend." In that case, the *Battenkill*, in the county of *Washington*, though not declared by statute to be a public highway, yet having been used by the public, for more than 26 years, for the purpose of floating down timber and boards, it was held, that the usage had grown into a public right, and that an action would lie against a person for obstructing the passage of rafts, by the erection of a mill dam. In *Stoughton and others v. Baker*, (4 Mass. Rep. 522.) which was the case of a dam across the *Neponset* river, the Supreme Court of *Massachusetts* laid down the same doctrine. The defendant, in that case, claimed under a grant of a mill dam, and a weir for taking fish, appurtenant to the dam, in 1683, from the town of *Dorchester*, by which the grantee had a several fishery, which was confirmed by the colonial legislature, and without any sluice way for the passage of fish, until 1789, when the legislature directed that a passage should be opened for fish. Chief Justice *Parsons*, who delivered the opinion of the court, said, that whether the defendant had a franchise of a several fishery, or not, made no difference. The public still had a right to have a convenient passage way for fish to ascend the river to the ponds; and that every owner of a mill dam holds it on the condition, *or under the limitation, that a sufficient and reasonable passage way shall be allowed for the fish. That this limitation, being for the benefit of the public, was not extinguished by any inattention or neglect in compelling the owner of a mill dam to comply with it.

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It is no objection, in this view of the case, that the indictment is laid *contra formam statuti*; for those words may be rejected, if necessary, and the indictment is maintainable at common law. (1 *Chitty C. L.* 238. 2 *Hawk. Indict. St.*)

It will be contended by the defendants, that the *Saranac* is not a navigable river, and that the defendants, after the exclusive enjoyment of their property for so many years, cannot now be disturbed. The cases which have been cited, show that no *laches* can be imputed to the government or the public.

But it will be said that the act of the legislature was contrary to the constitution, and, therefore, void. The right of the legislature to regulate the use of navigable waters within the territory of the state cannot be questioned. (9 *Johns. Rep.* 561.) The legislature have declared most of the rivers and creeks in the state, public highways, and have provided for the punishment of those who shall, by mills, dams, or weirs, obstruct their navigation. The different acts on the subject, passed from time to time, are embodied in the revised

act of 1813, (2 N. R. L. 285. sess. 36. c. 47.) The legislature have never considered these acts as unconstitutional. If these private rivers are thus made public highways, the obstruction of them, whereby the public are prevented from using them in the usual manner, is a nuisance. The *Battenkill* is a much smaller stream than the *Saranac*. But the court said, that though it was omitted in the acts declaring certain rivers and streams highways, yet the public had acquired a right to use it. "A river not navigable, in the common law sense of the term, and though the fee of it belongs to the owners of the adjoining banks, may still be liable to the public uses of rafting and boat navigation, as a public highway." (10 *Johns. Rep.* 237. 3 *Caines*, 307. 318, 319.) But there is an express reservation in the patent to Z. Platt, of all *carrying places* on all waters within the land granted. There is, also, an implied reservation as to roads or highways. *(14 *Johns. Rep.* 255. 1 *Mod.* 105. *Willes*, 265. 4 *Burr.* 2162. 2165.)

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Should the statute of limitations be objected, it may be answered, that the maintaining and keeping up the dam, without allowing a free passage to salmon above it, is a continued nuisance.

Walworth, contra. 1. The *Saranac* is not a navigable river, and the obstruction of it, therefore, is not a public nuisance; and if navigable, the public right is extinguished by the long, uninterrupted, and exclusive possession and enjoyment of it by Z. Platt, and the defendants under him. Inland waters or streams are of three kinds: 1. *Arms* of the sea, where the tide usually ebbs and flows, which, belonging to the crown or government, no individual can have any right therein, except by grant. (1 *Harg. Law Tracts*, 17.) 2. Large navigable rivers, used for navigation by vessels and boats: such as the *Hudson*, the *Susquehannah*, and *Connecticut* rivers. By an act passed 9th of *March*, 1771, and which was re-enacted the 31st of *March*, 1785, the legislature of *Pennsylvania* declared the *Susquehannah* a public highway. (2 *Laws of Pennsylvania*, 311. ch. 1144.) 3. Streams of water, not navigable, and which belong, exclusively, to the owners of the adjacent soil. (1 *Harg. Tracts*, 5. 8. 9.)

To make a river a navigable or public river, it must be navigable at all seasons; not occasionally, when swollen by rain or freshets. There is scarcely a stream or rivulet in the country that may not, at some time, be so swelled by rains as to be conveniently used by the public for floating rafts, or even for boats. But the evidence in this case shows that no boat ever went up or down the *Saranac*; that it cannot be passed, in ordinary seasons, even with a canoe. Timber cannot be floated down in *rafts*; and large single pieces pass down with great difficulty, and at much expense. The case of *Shaw v. Crawford* is not applicable. It was decided on the principle

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that the *Battenkill*, having been used as a public highway for 27 years, a right of passage had been acquired by the public; and the cases show, that exclusive use or possession of water, in any particular way, for 20 years, gives a right. (*Bailey v. Shaw*, 6 *East*, *208—214. 3 *Caines*, 316. *Cowp.* 102. 10 *Johns. Rep.* 380. 3 *Term Rep.* 159.) Twenty years peaceable and uninterrupted possession is sufficient to afford the presumption of a grant, and that grant is presumed to be commensurate with the right actually enjoyed. (2 *Saund.* 175. n. (a) 1 *Bos. & Pull.* 402. *Phillips's Ex.* 122.) The exclusive enjoyment of this river by the patentee, and those claiming under him, from the year 1785, was fully proved. The *Saranac*, for seven miles from its mouth, is included within the patent to *Z. Platt*, which contains no reservation of the river or water.

2. The owners of land, on each side of the river, have an exclusive right to the fishery in it; and if the dam is an injury to the fishery, the only remedy is by an action on the case by the owner of the land adjoining the river. Where a nuisance affects a private individual, the remedy is by action, not by indictment. (4 *Burr.* 2162. 4 *Dallas*, 67. 1 *Mod.* 105.) Again, there was no fishery in this river. The land was uninhabited and unoccupied before the patent to *Z. Platt*, who erected the dam the year after he obtained the grant. The erection of the dam, then, created the only fishery, for it is not until after its erection that we hear of *salmon* being caught, and that below the dam. It is a well known fact, that salmon have abandoned all the small rivers and streams in that part of the county, since it has become inhabited, and the rivers are used for mills, boats, or rafts.

3. But we contend, that the act (sess. 24. ch. 127.) is unconstitutional and void. When that act was passed, *Z. Platt*, under the patent to him, had a vested right in this mill dam, and to the use of the water within the limits of his grant. There are many mills on the *Saranac*, and the evidence shows that it is not possible to make a sluice way or slope, which salmon can ascend, without injuring the mills and rendering them useless. It is well settled, that the legislature cannot take away private property without making compensation to the owner. The owner of land through which a stream of water runs has a legal right to the use of the water, of which he cannot be deprived without his consent, or a just compensation. (*Gardner v. Newburgh*, *2 *Johns. Ch. Rep.* 162.) The act ought to be so construed as to except cases where individuals had already erected dams which would not admit of such a sluice way or slope, as would permit fish easily to ascend, without destroying all their property in the mills. For we cannot presume that the legislature intended such a violation of private right, or that it not only required the party to destroy his own property, but to do it at his own expense.

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[SPENCER, Ch. J. If the right was absolutely vested in *Z. Platt*, no person will pretend that the legislature could divest him of that right without making compensation.]

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Again; no fish visit this river from the ocean. These salmon ascend from the lakes, and are fresh water fish. The case of *Stoughton v. Baker*, decided in *Massachusetts*, is not applicable. The *Neponset* is a river which empties into the sea, and which is annually visited by shad and other fish from the ocean. The *Saranac* is not such a river. Besides, there are peculiar features in that case. By the royal charters granted to the *New England* colonies, all fisheries, &c. are expressly granted for the use of the colonies. (1 *Trumb. Hist. of Connecticut*, 55. *Appendix*.) And, accordingly, we find the legislature of *Massachusetts*, as early as 1641, declaring all the fisheries, &c. in rivers, ponds, and coves, where the sea ebbs and flows, free to all persons, and authorizing them to go across the lands of the proprietors for that purpose. (2 *Laws Mas.* 996. *Appendix*.) In 1709, the legislature of *Massachusetts* passed a general law, prohibiting the building of any dam, &c. which would obstruct the passage of fish up the rivers, &c.; but this act did not extend to any dam already built. In 1746, another act was passed on the same subject, directing ways or sluices to be built in all dams, so as to allow fish to ascend; but so careful were they of the rights of private property, that they direct that the fish-ways in all such dams as were erected prior to the first act, should be made at the public expense. (2 *Mass. Laws*, 992. 1020.) Ch. J. *Parsons* admits, that before the grant of the mill privilege to *Israel Stoughton*, the public at large had a *free fishery* in the river. These acts of the legislature of **Massachusetts* were all passed before the adoption of the constitution of the *United States*, and had been acquiesced in for more than a century. The rights were acquired under those laws. It was no violation of private right to pass a law requiring a fish-way to be made. In this state, the public claimed no right to these rivers or streams until after the adoption of the constitution; and the act of 1800 was not passed until 15 years after the defendant's dam had been erected; and that act can be construed to extend only to streams which belonged to the public, either by reservation, or as being navigable, or in which a public right of fishery existed. But the public had no right to the fish or fishery in this river. It belonged to the patentee, and the legislature could not take away his right, without impairing the obligation of a contract.

4. The remedy, in this case, if any, is barred by lapse of time. In *England*, there is no general statute of limitations in regard to prosecutions for crimes. But our statute (sess. 24. ch. 193. 1 *N. R. L.* 184.) is general. All suits, informations, and indictments, for any crime or misdemeanor, murder excepted, must be brought or exhibited within *three years* next after the

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offence shall have been committed. If this dam was a public nuisance at all, it was so immediately after the act of 1800 was passed. If the reasoning on the other side be correct, it would be a ground for an indictment a hundred years hence. In the case of the *King v. Smith*, (4 *Esp. N. P. Rep.* 109.) Lord *Ellenborough* held, that the enjoyment of a place for a market for 20 years barred any prosecution for a nuisance, and directed an acquittal of the defendant.

5. The sluice-way, or slope for the salmon to ascend the dam, has been made according to the directions of the act of 1800.

Foot, on the same side. There are three kinds of fisheries, viz. a *common* of fishery, a *free* fishery, and a *several* fishery, (2 *Bl. Com.* 39, 40.) A *common* of fishery is a right to take fish in all waters, strictly called *navigable*, and belongs to every citizen of the state. The owner of this right has no property in the fish until he takes them.

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*A *free* fishery is an exclusive right of fishing in a certain designated portion of navigable waters; or of fishing in them generally, at appointed times. This right is acquired only by grant from the state, or by prescription, which is evidence of a grant. The owner of it has a property in the fish before they are caught.

A *several* fishery is an exclusive right in the owner of the soil, adjoining waters not strictly denominated *navigable*, to take fish in those waters to the middle of them, and opposite his own land.

Navigable waters, in strictness, are arms of the sea, and rivers in which the tide ebbs and flows. These waters, and the bed of them, belong to the people, and do not pass by a grant of the adjoining land. The fishing in them is a *common* of fishery. They may be called the first class of navigable waters; and with them we may class the large lakes which are capable of being used in the same way.

There are other waters, sometimes called *navigable*; though, rightly speaking, they ought not to receive that appellation. These are rivers in which the tide does not ebb and flow; yet, in the language of the books, they "are subject to the servitude of the public interest for the carriage of boats, rafts, &c., provided they can be so used advantageously by the public." Such waters, and the bed of them, pass, by a grant of the adjoining soil, as appurtenances. If an individual owns the land on *both* sides, he takes the whole of the waters and their bed; and if he owns the land only on *one* side, he takes the water and the bed to the centre. These may be called the second class of navigable waters; and to them may be added small lakes susceptible of the same public use. The fishery in them is a *several* fishery, and belongs exclusively to the owners of the adjoining soil. (3 *Caines's Rep.* 312. 10 *Johns. Rep.* 237

Doug. 444. *Har. Law Tracts*, pt. 1. ch. 1, 2, 3, 4. 5 *Davies's Rep.* 152. *Burr. Rep.* 2162.)

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The proposition to which the attention of the court is particularly called is, that the owners of the land adjoining the second class of navigable waters have the exclusive right to the fishery in them, it being a *several* fishery. The Supreme Court of Errors of the State of *Connecticut*, *in June, 1818, (*cited from a newspaper*,) decided, that "the proprietors of land on the *Connecticut* river, above the flowing of the tide, have an exclusive right of fishery, and of the use of the water, generally, to the middle of the river, subject only to the public right of passage with boats, rafts, &c."

The counsel then examined the facts in the case, and insisted that the river in question did not belong to the second class of navigable waters, but was a private stream, owned by the defendants, and that no individual, nor the public, had any right to it, or to the fishery in its waters. Yet, admitting that it did belong to the second class of navigable waters, still the defendants, owning the bed of the river, and the lands on each side of it to the top of the banks, as far up the river as there is any testimony that salmon ever went, have an exclusive right to the fishing in its waters opposite their lands and no judgment, therefore, can be given against them on the first count of the indictment, it being on the common law, and for a violation of a right of fishery supported by that law.

Again; suppose it was proved, that the dam in question obstructed the passage of the fish up the river, so as to injure materially the fishery of those who own lands adjoining the river, above the property of the defendants. The injury would not *then* be common to all the inhabitants of the state, but to a given portion of them; and the remedy should be by action, and not indictment. (*Hawk. P. C. lib. 1. ch. 75.* and authorities there cited.) If the remedy, in consequence of the multiplicity of suits, should be found inconvenient, the Court of Chancery would give the proper relief. Cases are found, in which an indictment has been sustained for an injury to a *common* of fishery, but not for an injury to a *several* or *free* fishery.

The defendants ought not to be convicted on the second and third counts of the indictment, which are founded on the statute, because that statute is *unconstitutional*. By the case, it appears that there is not more water in the river, in ordinary seasons, than is required to keep in full operation the mills and factories of the defendants; and that a slope, constructed according to the statute, would take from the mills a large column of water, the want of which would oftentimes impede their operation, and would effectually *prevent the erection of any new works or factories, which hereafter may be advantageously erected by the defendants, if their water privileges are left entire. A compliance with the statute must, therefore,

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seriously injure the rights of the defendants. The river is a private stream, as has been shown from the facts in the case; and its bed, and the waters flowing in it, did, therefore, vest in *Z. Platt*, by virtue of the patent to him, and are now vested in the defendants who hold under him. But admitting that the river belongs to the second class of navigable waters, still the fishery and the general use of the water in the river, through the extent of the patent, subject to the public right of rafting, boating, &c., vested by virtue of the patent in *Z. Platt*, and are now vested in the defendants. The statute interferes with and injures those rights, without furnishing a compensation to the owners. Such a statute must be *unconstitutional*. A majority of this court so held, in the case of *Dash v. Van Kleeck*, (7 Johns. Rep. 477.) The principle is settled, however, in the case of *Fletcher v. Peck*, (6 Cranch's Rep. 131.) In that case, the Supreme Court of the United States held, that a *right vested* is a *contract executed*, and a statute impairing a vested right impairs the obligation of a contract, and is unconstitutional. This case was reviewed and approved of by the same court, in the cause of the *State of New-Jersey v. Wilson*, (7 Cranch's Rep. 164.)

T. Sedgwick, in reply. The indictment is good under the statute. The act says there shall be a slope so constructed as to permit the salmon freely to pass above the dam. Now the evidence shows that it was so constructed that *salmon* could not ascend. But if the indictment cannot be supported under the statute, it is good at common law.

The reservation of "carrying places," in the patent to *Z. Platt*, shows that the *Saranac* was considered a public river, and might be declared a public highway; and it has been declared to be a highway. *Fisheries*, in every country, are guarded with great care, and under the most cautious regulations. Our statute book shows the extreme solicitude of the legislature to preserve the fisheries in our **rivers*, for the use of the public. The *salmon* fishery is particularly valuable. *Salmon* abound in our lakes, and penetrate all the streams which empty into the lakes. The settling of the country by inhabitants does not deter them from ascending the rivers; it is the numerous dams and obstructions which are erected on these streams which prevent their passage. The evidence in the case is, that *salmon* abound at the foot of the dam, and would ascend the river if not hindered by that obstruction. The numerous sections of the "act relative to fisheries in certain waters," (2 N. R. L. 238.) show that it is the policy of the state to preserve the fish. The owners of the land cannot take fish on these rivers and waters except in the mode prescribed by the legislature. The court said, in the case of *Shaw v. Crawford*, that "every impediment to the natural course and natural use of rivers and streams, which essentially contribute to the public benefit, be-

comes a public nuisance." The case of *Stoughton v. Baker* is strongly in favor of the plaintiffs. That case underwent much discussion, and was decided, not on a particular statute of *Massachusetts*, but on the broad and general principles of the common law. It is there laid down as an established rule, that every person erecting a mill or dam on a river, unless he has a grant, must leave a free passage to the fish. Though the owner of the land may have a right *ad medium filum aquæ*, yet he cannot so obstruct the river as to prevent the passage of the fish, or drive them from their accustomed haunt. The maxim is, *sic utere tuo, aut alienum non ledas*. If the public have a right to pass with boats, or float timber, the individual cannot, consistently, have a right to set his nets for fishing. When these rivers were declared, by statute, public highways, the exclusive right of any individual to the use of them ceased. It is said that an indictment does not lie, but that the party should bring his private action. Certainly not, where so many persons are interested.

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Again; it is said, that there has been an uninterrupted enjoyment of this river, by the defendants, since 1786. But in regard to easements of this nature, there can be no presumption, from lapse of time, against the public. The legislature of *Pennsylvania* declared the *Susquehannah*, including *all its branches, a public highway, on account of its great importance to the public, in floating down timber and lumber; although the tide does not ebb and flow higher than *Havre de Grace*. The *Saranac* being susceptible of this use, to the great convenience of the public, is, *quoad hoc*, a public highway. (a)

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SPENCER, Ch. J., delivered the opinion of the court. In considering this case, these facts will be assumed: that the defendant has omitted to comply with the requirements of the acts of 1801 and 1813; that the dam across the *Saranac* has not been altered so as to admit the passage of salmon into the waters above it; and that, prior to the erection of a dam across the *Saranac*, at its mouth, salmon passed up that river, above the present dam. I shall not notice several minor exceptions to the indictment, which were taken on the argument, as I prefer placing my opinion on the broad question, whether, under the facts proved, the defendant's dam can legally be considered and treated as a public nuisance.

From an examination of the authorities which I have been able to consult, I am satisfied that the defendant has a com-

(a) Vide *Carson v. Blazer*, 2 *Binney's Rep.* 475. By the civil law, all rivers, the flow of whose waters was perennial, belonged wholly to the public. Those streams only which dried up in the summer, were considered private property. The right of fishing in public rivers was free and common; and no obstruction or diversion of the water was permitted. The public, also, had a right to use the banks of rivers for towing, &c. (*Dig. lib.* 43. *tit.* 12, 13, 14, 15. *Voet ad Pand. h. t. Cod. Nap.* 538. 544. 650.) This, however, is not the common law of *England*. 3 *Term Rep.* 253. *Ball v. Herbert*.)

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plete and exclusive ownership of the *Saranac*, from its confluence with the lake, so far as he has succeeded to the rights of *Z. Platt*. Lord *Hale*, in his treatise *de jure maris et brachionum ejusdem*, edited by Mr. *Hargrave*, (pages 8 and 9,) says, "There be some streams or rivers, that are private, not only in propriety and ownership, but also in use, as little streams or rivers *that are not a common passage for the king's people*. Again, there be other rivers, as well fresh as *salt, that are of common or public use for carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow, or not, are, *prima facie, publici juris*, common highways for a man or goods, or both, from one inland town to another." "Thus (he observes) the rivers of *Wey*, of *Severn*, of *Thames*, and divers others, as well above the bridges and ports, as below, and as well above the flowings of the sea, as below, and as well where they are become private property, as in what parts they are of the king's property, are public rivers, *juris publici*; and, therefore, all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment, and removed." Again; (page 5,) he says, "Fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent, so that the owners of one side have, of common right, the propriety of the soil, and, consequently, the right of fishing *usque ad filum aquæ*, and the owners of the other side, the right of soil or ownership and fishing unto the *filum aquæ* on their side; and, if a man be owner of the land on both sides, in common presumption, he is owner of the whole river, and hath the right of fishing according to the extent of his land in length; with this (he adds) agrees the common experience." I have extracted fully and freely from this valuable treatise, because it is universally considered as high authority, of itself, and because it defines, with more precision than any other work, what constitutes a public river; and marks the distinction between such as are public and those which are private property. The adjudged cases will, however, bear out all the positions laid down by Lord *Hale*. In Lord *Fitzwalter's* case, (1 *Mod.* 105.) the question was, whether the defendant had not the right of exclusive fishing in the river of *Wall-fleet*. *Hale*, chief justice, ruled, that in the case of a private river, the lord having the soil, is good evidence to prove that he has the right of fishing, and it put the proof on them that claim *liberam piscariam*; but in case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all. In the case of *Carter v. Murcott*, (4 *Burr.* 2162.) Lord *Mansfield* held, that the *rules of law were uniform; in rivers not navigable, the proprietors of the land have the right of fishing, on their respective sides, and it generally extended *ad filum medium aquæ*; but in navigable rivers, the proprietors of the land on each side have it

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not; the fishing is common; it is, *prima facie*, in the king, and is public. I cannot discover that these principles and distinctions have ever been denied, or overruled; and I venture to say, that they are of indisputable authority. We perceive, then, that some rivers and streams are wholly and absolutely private property, and that others are private property, subject, nevertheless, to the *servitude* of the public interest, and, in that sense, are to be regarded common highways, by water. The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact, whether they are susceptible, or not, of use as a common passage for the public. In *Palmer v. Mulligan*, (3 *Caines's Rep.* 319.) this distinction was adopted by Chief Justice *Kent*. No case or *dictum* has been cited, unless it be those of *Stoughton v. Baker*, (4 *Tyng*, 522.) and *Shaw and others v. Crawford*, (10 *Johns. Rep.* 236.) which considers the circumstance, that fish generally, or salmon, (which Lord *Hale* pronounces not to be royal fish,) frequent a river at certain seasons, as having any controlling effect on the question, whether the river is to be regarded as private property, or liable to the public servitude; on the contrary, we have seen that this circumstance has no influence on the question. It is evident, on looking into the case of *Shaw and Crawford*, that the court placed the decision on the fact, that the *Battenkill* had been used, for *twenty-six years*, for rafting; and we held, that a usage, for such a length of time, would grow into a public right, especially when the public interest was so essentially promoted. The observation, "that every owner of a mill-dam on a stream which fish from the ocean annually visit, is bound to provide a convenient passage-way for the fish to ascend," was an *obiter dictum*, unnecessary to the decision of the cause, and founded entirely on the case of *Stoughton v. Baker*. In that case, the Supreme Court of *Massachusetts* *held, that a legislative resolution appointing a committee, who were authorized to require the proprietors of certain dams on *Neponset river*, to alter them, in such way as should be sufficient for the passage of shad and alewives, at the dams, was a legal proceeding, not repugnant to the constitution. The opinion is founded on the ancient and long continued usage of the general court of *Massachusetts*, to appoint commissioners to locate and describe the site and dimensions of passage-ways for fish; and, under the circumstances of the case, it was held, that the right of the proprietor of the dam was subject to the limitation that a reasonable and sufficient passage should be allowed for the fish. The court, however, expressly say, that any prostration of the dam not within the limitation, would be an injury to the owner, for which he might appeal to his country, and have a remedy; and that if the government, in the grant of a mill privilege, expressly, or by necessary implication, waive this limitation, it would

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be bound. In the case then under consideration, the court said, it would be an unreasonable construction of the grant to admit, that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled. Whether, in that case, the *Neponset* river was navigable above the dam, is no where affirmed or denied; but it is perfectly clear that the court proceeded on local usages and customs, and not upon the general and received doctrines of the common law; for not a single case is referred to, nor is it even asserted, that the principles advanced are sanctioned by the *English* common law; whereas, it has been shown, that, by the common law, the property in the river *Saranac* passed to *Zephaniah Platt*, and has been transmitted, through him, to the defendants, without any limitation or restriction, and that the fishery itself became vested in the proprietor of the river; it being a conceded fact, that the river is unnavigable for boats of any kind; for there is no weight in the circumstance that, for a few years past, and since 1810, rafts have occasionally been brought down this river, when connected with the fact that the defendant has received a consideration for that privilege. So far, then, from this being the exercise of a public *right, it is a recognition of the defendant's property in the river, and fortifies and supports the defendant's claim to it, as private property. In a case thus circumstanced, the opinion of the court in *Stoughton v. Baker* would protect the defendant in the exclusive and undisturbed enjoyment of all the rights acquired under the grant, for there is no reservation of the use, by the public, of the river, either for passage or fishing. The reservation of *carrying places*, upon any water communications within the limits of the grant, was intended to secure to the public *portages*, had the river been, in fact, navigable. Upon this subject, the public functionaries appear to have been ignorant; and this reservation was either mere matter of form, or was inserted for greater caution, with an intention to secure the right of having carrying places, if, upon further exploring the country, the river should be found navigable; but, it being otherwise, the reservation amounts to nothing. *Zephaniah Platt*, then, and his assigns, gained a complete right to the exclusive enjoyment of the river, within the bounds of his patent, and to take the fish frequenting it. He and those holding under him have enjoyed this right, uninterruptedly, for more than thirty years; and the indictment charges no other offence than that of obstructing the *Saranac*, by a dam near its mouth.

The indictment is founded on, and can be supported only by, the force and validity of the two statutes, of the 3d of *April*, 1801, and of the 5th of *April*, 1813. The right of others to take fish in the *Saranac*, above the defendant's dam, cannot be a public right; for if the river has been granted, above the dam, to *Zephaniah Platt*, the right to take the fish is a private and individual right; and if it has not been granted, yet the right

has not become public, so as to authorize the entry of any one who may see fit to enter, for then the right would belong to the state. There can be no doubt, however, and so it was stated on the argument, that the lands have been granted to the high falls, beyond which *salmon* never pass. These statutes do not expressly mention, or refer to the *Saranac* river; and the general words of the statutes ought to be construed with an implied exception of such rivers as had been fully and absolutely granted, without any reservation on the part of the state of a right to control the perfect use and enjoyment of the thing granted. The power of regulating and controlling the use of the *Saranac*, so as to subserve the public interests, would have been impliedly reserved, had that river been navigable; but, not being so, the legislature have no greater right to pass laws, directing how the waters of that river shall be used, than they would have to regulate the use of the most inconsiderable rivulet, or streams throughout the state, which have been granted by and held from the state. We are compelled, then, by an imperious duty, to examine and decide, whether the acts in question, under the facts in the case, are warranted by the constitution of the *United States*. I would premise, however, and it is not disrespectful to the legislature to presume the fact, that they were uninformed as to the terms and extent of the grant to *Zephaniah Platt*, and of the conditions and reservations in the grant itself; and that they were also uninformed as to the innavigability of the *Saranac*, or else there would have been an express exception of that river. Had the question been propounded to the legislature, whether they intended to invade private rights, so far as to compel the proprietors of those valuable and extensive establishments near the mouth of the *Saranac*, with their own hands, to destroy their usefulness, by altering their dam so as to deprive them of the use of the water to any beneficial purpose, when these proprietors had acquired, by a grant from the state, and the law of the land, an ample and uncontrollable right to the sole and uninterrupted use of those waters, it cannot be doubted, from the high and sacred regard to private rights which the legislature have always observed, that they would indignantly have disavowed any such intention.

Upon a question involving a construction of the constitution of the *United States*, we have had occasion, in the case of *Mather and Bush*, (16 *Johns. Rep.* 233.) to express our sense of the paramount and controlling authority of the decision of the Supreme Court of the *United States*, upon that clause in the constitution which declares, that no state shall pass any law impairing the obligation of contracts. On the *present subject we have the decided opinion of that court, pronounced in a case analogous in principle. In the celebrated case of *Fletcher v. Peck*, (6 *Cranch*, 136.) Chief Justice *Marshall*, in delivering the opinion of the court, held, that a grant made by

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the state of *Georgia* of certain lands, was to be regarded as an executed contract, under the constitutional provision, and that the state of *Georgia* could not, either by general principles common to our free institutions, or by the provision in the constitution of the *United States*, pass a law, whereby the estate of those holding under the first grant could be constitutionally and legally impaired, and rendered null and void. The same principle was again maintained, by that court, in the case of the state of *New-Jersey v. Wilson*, (7 *Cranch*, 164.) The acts in question do not profess to render the grant to *Zephaniah Platt* null and void; but if judgment should pass against the defendant, on the ground that his dam is a public nuisance, it would become the duty of the court to adjudge, that the nuisance be abated; and thus the grant, under which the defendant holds, would be manifestly impaired, inasmuch as he would be prohibited the use and enjoyment of a valuable and essential part of it. The principle adopted by the Supreme Court of the *United States* extends as fully to a case where a material and essential part of the grant is impaired, as to a case where it is entirely impaired. The conclusion, then, is irresistible, that the acts in question are unconstitutional and invalid, so far forth as they affect the river *Saranac*, within the bounds of the patent to *Zephaniah Platt*.

It is not intended to call in question the power or supremacy of the legislature, to legislate for general and public purposes, promotive of the public good, when acting within the pale of the constitution; nor is the power of taking away private property for public purposes at all denied. Private property may, in many instances, be appropriated to public use; but such appropriations are constitutional, legal, and justifiable, only when a fair and just equivalent is awarded to the owner of property thus taken. In the present case, no equivalent is offered, or provided, for the loss which must inevitably ensue upon a compliance with the requirements of the statutes on which the indictment is founded.

I am sensible that the legislature have passed many laws regulating the slope of dams, to facilitate the passage of fish; but what are the particular circumstances of the rivers, in regard to which these laws were enacted, I am uninformed; it may be that they are navigable for boats, and then no objection could lie to such acts. In the present case, the river *Saranac* is not capable of being used as a passage way for boats, or water craft of any kind. It has been granted, and thus has become private property, as high up as salmon ascend. The fishery itself has passed under the grants; the defendants, and those whose estate they have rightfully and legally acquired, erected the dam sought to be altered; and they have been in the uninterrupted enjoyment of all the rights connected with the dam for more than thirty years. Can it admit of a doubt that the defendants' rights, growing out of a contract executed

by the state, and for which a valuable and competent consideration has been received, will be impaired by the demolition of the dam, or an alteration of it, which might, and probably would, essentially destroy an immense property?

I have already said, that the legislature would, no doubt, have excepted the *Saranac* out of the operation of the statutes, had all the facts been known to them; yet, as it is included under the general terms and provisions of the acts, I am constrained to say that those acts are inoperative, as regards the defendants, on the ground that they impair the obligation of a contract. In coming to this conclusion, we act conformably to the declared opinion of the highest tribunal under the constitution of the *United States*, whose decision we are bound to receive, as a correct exposition of that instrument. (a)

Judgment for the defendants.

(a) Vide *Hooker v. Cummings*, 20 *Johas. Rep.* 90.

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***BURTCH against NICKERSON.**

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IN ERROR, to the Court of Common Pleas, of *Putnam* county. *Nickerson* brought an action of *slander* against *Burtch* in the court below. The declaration stated, that, at the time of publishing the slanderous words, the plaintiff was, and long before had been, a *blacksmith*, and carried on the business and trade of a blacksmith, honestly, and found and provided all such iron as was necessary, and required of him in the business aforesaid, and made correct charges, and *has always kept honest and faithful accounts with all persons relating to his trade*; and until the speaking the words charged, was never suspected of keeping false books and accounts with persons who employed him; yet the defendant, in order to injure the plaintiff in his business, and to cause it to be believed that he kept false books of accounts, in a certain discourse which he had with divers good citizens, of and concerning the plaintiff *in his said business*, spoke and published the words following: "*He keeps false books, and I can prove it.*"

The plaintiff further alleged special damages, in the loss of customers, who were named in the declaration; and on the trial he proved, by *Edward Mooney*, the words substantially as laid, and that, in consequence of publishing the same by the defendant, the witness did not employ the plaintiff as a blacksmith, which he otherwise would have done; that the defend-

To say of a blacksmith, in relation to his business and trade, "He keeps false books, and I can prove it," is actionable: and where the declaration stated, that the plaintiff, at the time of publishing the slanderous words, was, and long before had been, a blacksmith, and carried on the business and trade of a blacksmith, honestly, and found and provided all such iron as was necessary and required of him in his business; and made correct charges, and had always kept honest, true, and faithful accounts

with all persons relating to his trade, &c. Yet the defendant, in order to injure the plaintiff in his business, and to cause to be believed, &c., in a certain discourse of and concerning the plaintiff in his said business, spoke and published the following words, &c., it was held sufficient, without a more special averment, that there was a discourse of and concerning the plaintiff's trade, and that the words were spoken of his trade

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ant was speaking of the plaintiff as a blacksmith, when he made the charge of keeping false books. Other witnesses were examined on the part of the plaintiff, but their testimony did not appear to support the declaration.

The counsel for the defendant insisted, that the words were not, *of themselves, actionable*, unless they were spoken of the plaintiff's trade; and further, that they were not actionable in any sense, and more especially if they had reference to any item in the accounts of the parties; and that the plaintiff was not entitled to recover, unless he had *proved special damages*, and requested the court so to charge the jury.

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*The court charged the jury, "*That it made no difference whether words were spoken of a blacksmith, or merchant, as to their being actionable,*" but *did not charge on any other point*. The jury found a verdict for the plaintiff, on which judgment was rendered. A bill of exceptions was taken to the opinion of the court; and on the return to the writ of error, the cause was submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court. The defendant in error contends, that the plaintiff in error is confined to the single point contained in the bill of exceptions. This, I apprehend, is incorrect; for when the record is made up, a special assignment of errors to the bill of exceptions is not required, but a general assignment is sufficient. (13 Johns. Rep. 475. *Shepherd v. Merrit*.) Consequently, the plaintiff in error may claim to have the judgment reversed, for matter apparent *on the record or bill of exceptions*.

Before I consider whether the exceptions are well taken, it is proper to state, that no question can now arise on those points on which the court below omitted to charge the jury. (T. Raym. 404. 2 Term Rep. 145. Show. 120. 122.) A bill of exceptions may be taken *on some point of law, either in admitting or denying evidence, or a challenge, or some matter of law arising upon a fact not denied, in which either party is overruled by the court*. (Graham v. Camman, 2 Caines's Rep. 168.) But the refusal of the court to express an opinion on any particular point is not a case within the reach of a bill of exceptions. Our inquiry then is, in the first place, whether the declaration contains a good cause of action, independent of the special damages alleged; and if so, whether the charge of the court below, on the point adjudged, was correct.

The general rule is well settled, that slanderous words are not actionable, unless "*the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment.*" (Brooker v. Coffin, 5 Johns. Rep. 188.) The exceptions to the general rule are words spoken of a person in his office, *profession, or trade, or which impute to him an infectious disease. (*Feise v. Linder*, 180

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3 Bos. & Pull. 374. note (a.) *Comyn's Dig. Title Action on the case for defamation, (D.) 10 D. 29.*) If the present action can be supported, it must be because it comes within one of the exceptions to the general rule.

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If the words are not actionable, but in regard of the plaintiff's trade or profession, it is not sufficient to allege the speaking of him, without a *colloquium of his trade, &c.* (1 Com. Dig. 277. (G. 3.) 1 Lev. 250.) Yet, if the speaking be alleged to be of the plaintiff and his art, it is sufficient, without an *express colloquium of his trade.* (*Comyn's Dig. 277.*)

In the present case, the plaintiff charges, that he was, at the time of speaking the words, and long before had been, a blacksmith, *carrying on the trade of a blacksmith, and found and provided all such iron as was necessary, and required of him in the said business, and that he always kept honest and true accounts with all persons relating to the trade, and that the defendant, in a discourse concerning the plaintiff, in his said business, published the words charged in the declaration.* Here, then, it appears, that a colloquium is substantially stated; and although the plaintiff might have averred expressly, that there was a discourse concerning the trade, and, then, that the defendant published the words of the plaintiff in relation to such trade, I do not perceive any material departure from that form of declaring; for in speaking "*of the plaintiff in his trade,*" it follows, of necessity, that the trade or business must have been, in part, the subject of discourse; but admitting that here is not strictly a colloquium concerning the trade, still the declaration is good, and is supported by the authorities cited from *Comyns* and *Levinz*, which declare, that if it be alleged that the words are spoken *of the plaintiff and his art*, it is sufficient.

In 8 Went. 232. the averment is, that the words were "*spoken concerning A. B. as such trader, and of, and concerning, the state of his circumstances,*" but no colloquium is laid.

The next question is, whether words calculated to injure and impair public confidence in the integrity of a mechanic, *in relation to his trade, are actionable. That they are so, when spoken of a merchant, cannot be doubted. (*Backus v. Richardson, in Error, 5 Johns. Rep. 471.*) It is well settled, in *England*, that words, not in themselves actionable, become so, when spoken of a person in his trade or profession; and the rule equally applies, whether the plaintiff is a merchant, or is carrying on the business of a mechanic. The plaintiff in error contends that no action can be sustained in this case, because the words, if true, do not impute criminality, for which the plaintiff is punishable; but it has already been shown, that cases of this description are exceptions to the general rule, and are governed by different considerations. Whether the law is wisely settled, that a charge imputing the want of moral honesty is actionable, when applied to an individual in relation to his trade,

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and is not so, when there is no such reference, would be a useless inquiry.

The defendant, then, must be considered as liable, if a book of accounts appertains to the business of a blacksmith. The fact is averred in the declaration, and as to the necessity of such books, there can be no doubt, if credit is ever given for the work, labor and services.

In 5 Com. Dig. 260, 261. it is laid down, that to say of a weaver "*he pawneth the goods of his customers, and is not to be trusted, is actionable.*"

To say of a maltster "*he is a cheating knave, and keeps a false book;*" (1 Vent. 117.) "*he keeps false books, deal not with him;*" (Palm. 65.) and, generally, words which charge deceit or dishonesty, in the trade, are held to be actionable.

In 1 Lev. 115. (*Terry v. Hooper*, before cited) the court say, "*an action lies for speaking scandalous words of a lime-burner, or of any man of any trade or profession, be it ever so base, if they were spoken with reference to his profession.*"

My opinion is, that the charge is well alleged in the declaration, that the keeping of a book of accounts is incident to the business of a blacksmith, and necessary in this country, where credit is generally given, as well by the mechanic as by the merchant and professional man; that the words, as applied, are actionable, and entitled the plaintiff to recover, *without proving special damages. The charge of the court below is, in substance, that the words in this case were actionable equally as if spoken of a merchant. In my view, this was correct, and consequently the judgment ought to be affirmed; and that is the opinion of the court. (a)

Judgment affirmed.

(a) Vide *Loomis v. Swick*, 3 Wendell's Rep. 205. *Sewall v. Catlin*, Ibid. 291 *Mott v. Comstock*, 7 Cowen, 654. *Ostrom v. Calkins*, 5 Wendell's Rep. 263 *Tobias v. Harland*, 4 Wendell's Rep. 537.

ALBANY,
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v.
SMITH.

SOLOMON FERRIS and his Wife, and JOSEPH RANSOM and Wife, *against* ANNING SMITH, F. SMITH, and LUFF SMITH, impleaded with others.

THIS was a case in partition. The petition for partition, under the statute, (sess. 36. ch. 100. 1 *N. R. L.* 507. 2 *Rev. Stat.* 317, &c.) and notices, were dated the 10th of *November*, 1817, copies of which notices were served on the above named defendants, in *November*, and the petition, &c. presented in January term, 1818. Previous to that time, notice had been given, the 10th of *October*, 1817, to the infant children of *Lewis Smith*, of an application to the court in *October* term, 1817, for the appointment of a guardian, which was accordingly done, and *A. Smith*, above named, was appointed their guardian. The petition stated, that the petitioners, in right of their respective wives, with the defendants, naming them particularly, and stating their respective rights, and, *among them, *Eliphalet Smith*, and *Anning Smith*, of *Marlborough*, in *Ulster County*, are seized in fee simple of certain lands, &c. situated in *Marlborough*, in said county, describing them, &c., and praying for a partition, &c.

The above named defendants pleaded, "that they did not hold, nor on the day of the exhibition of the petition of the said petitioners in this behalf, nor ever afterwards, did hold the said land and premises in the said petition mentioned and described, nor any part or parcel thereof, together and undivided with the said petitioners, as the said petitioners, by their petition aforesaid, have supposed, and of this the said *A. S.*, *E. S.*, *W. S.*, and *L. S.*, put themselves upon the country, &c., and the petitioners to the like, &c.

At the trial the plaintiffs proved that *Anning Smith* died in possession of the premises, being about 169 acres of land, &c., in 1802, having been in possession thereof since 1775; that his son, *Lewis Smith*, took possession, after the death of his father, and died in possession about two years ago. That *Anning Smith* left several children, whom the witness particularly named, and, among others, *Anning Smith*, one of the above named plaintiffs.

The defendant gave in evidence a quit-claim deed, dated 29th of *October*, 1817, from *Anning Smith*, son of *A. S.*, de-

and gave the remaining two thirds of his personal estate to his daughters: *Held*, that *A.*, and the other devisees of the lands of the testator, took an estate *for life* only, under the will.

Where the defendants in *partition* pleaded *non tenent insimul*, on which issue was joined; and it appeared that *A.*, one of the defendants, had, before the service of the *petition and notice*, conveyed all his right in the premises, to one of his co-defendants, who was before a tenant in common with him; the court, after the rights of the parties had been ascertained, by the verdict, refused to turn the plaintiffs round to another action, on account of a *variance* between the *petition and proofs*, as to the *quantity* of interest in the respective tenants in common; but gave judgment, that, as to *A.*, the plaintiffs should go without day, and pay his costs; but that, as to the other defendants, the plaintiffs should have judgment, on the verdict, according to the proofs in the cause.

Where a testator, in the introductory part of his will, used these words. "And as to what worldly goods it has pleased God to endow me with, I will and dispose of in the following manner," and then gave his wife a third of his personal property, and the use of

[* 222] his house and furniture during her widowhood, and then devised as follows: "I do give and bequeath to my son *Anning* the one equal south half of *my land*, beginning at the river, and running west until it makes one hundred acres, together with the grist-mill, after he has arrived at lawful age, until that time it shall belong to my wife, to make use of as she may think proper;" the testator, in like manner, devised the other parts of his land, &c., to his sons, but without using words of inheritance, or the word estate,

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ceased, of all his right, title, and claim to the premises in question, being about 100 acres of land, a wood lot, containing about nine acres, and a piece of land, containing about 15 acres, to his brother *Eliphalet*, above named.

The defendants also gave in evidence the last will and testament of *Anning Smith*, the elder, deceased, dated 28th of *October*, 1802. The testator, after directing his burial, &c., added, "And as to what worldly goods it has pleased God to endow me with, I will and dispose of, in the following manner:" and, after making provision for his wife, devised as follows: "I do give and bequeath to my son *Anning*, the one equal south half of my land, beginning at the river, and running west until it makes one hundred acres, together with the grist mill, after he has arrived at lawful age; until that time it shall belong to my wife, *Eleanor*, to make use of as she may think proper." The testator, in like manner, devised the north half of his land, beginning at the river *and running west, until it made 100 acres, to his son *Lewis*; and, afterwards, added, "I do will and bequeath that my land, beginning west of the two hundred acres given to my sons, *Lewis* and *Anning*, and running west to the south-east corner of the button-wood bridge, and then north to the line of *Zophar Perkins*, be divided into equal parts &c.; and I give and bequeath one equal part to my sons *Eliphalet*, *Lewis*, and *Anning*, and to the heirs of my sons, *Nathan* and *Clark*, deceased, to be distributed by the executors." The testator devised, in a similar manner, various other parts of his real estate to his children and grandchildren; and gave the remaining two thirds of his personal estate to his daughters; and appointed his wife executrix, and his sons, *Eliphalet*, *Lewis*, and *Anning*, two of his sons-in-law, and *G. N.* his executors.

Sudam and *P. Ruggles*, for the defendants. They cited *Frogmorton v. Holyday*, 3 *Burr*, 1618. 6 *Cruise Dig.* 243, 244. tit. 38. ch. 11. s. 22, 23.

Oakley, (Attorney-General,) contra. He cited 8 *Johns. Rep.* 141. 9 *Johns. Rep.* 222. 10 *Johns. Rep.* 148. 14 *Johns. Rep.* 198. 6 *Cruise*, 305. ch. 38. s. 10. 25.

SPENCER, Ch. J., delivered the opinion of the court.

Two questions have been made on the argument; first, whether the will of *Anning Smith*, the elder, devising his real estate, vested an estate of inheritance in the devisees, or an estate for life only? 2d. Whether the alienation of the interest of *Anning Smith*, the younger, before the service of a copy of the petition and notice on either of the defendants, defeats the action?

On the first point, there can be no doubt that the will vested an estate for life only in the devisees. The will contains

no words of inheritance, nor any thing to show, according to the settled rules of construction, an intention on the part of the devisor to convey a fee.

The deed from *Anning Smith*, who was a co-tenant in common, bears date before the service of a copy of the petition and notice upon him, or either of the defendants; and, *until such service, the suit is not commenced. His plea is, therefore, made out, that he did not hold together with the other parties. But he conveyed all his right to *E'iphalet Smith*, who was, before that conveyance, a tenant in common with the plaintiffs and the other defendants. His plea, and that of the other defendants, except *Anning Smith*, is, therefore, falsified; for it appears they do hold as tenants in common. It is true that they do not hold precisely in the manner stated in the petition; but the act (1 R. L. 508. s. 3.) refers it to the court, *after the final determination of the issues, to ascertain and determine the respective rights of the parties in such lands, tenements, or hereditaments, and give judgment that partition thereof be made between them according thereto, or between such of them as shall have any right therein.*" If there be, then, a variance between the petition and proofs, as to the quantity of interest which any of the tenants in common have in the lands whereof partition is sought, this can be set right by the court, to whom it is referred to ascertain and determine the respective rights of the parties. There can be no reason, now that the rights of the parties are ascertained, to turn the plaintiffs round to another suit; and we are clearly of opinion, that the legislature never intended, by giving the plea of *non tenent insimul*, if the defendant was a tenant in common, that he should defeat the partition, by showing that the extent of interest was inaccurately stated in the petition. As to *Anning Smith*, as he was not a tenant in common when the proceedings were commenced, nor when he pleaded, he is entitled to go without day, and recover his costs; but as to the other defendants, the plaintiffs are entitled to judgment according to the proofs in the cause.

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Judgment accordingly.

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The land on which *Fort Niagara* is erected, never having been actually ceded by this state to the *United States*, it still belongs to this state; and its courts have jurisdiction of all crimes or offences against the laws of the state, committed within that fort, or its precincts; though it has been garrisoned by the troops of the *United States*, and held by them since its surrender by *Great Britain*, pursuant to the treaties of 1783, and 1794; for the *United States* acquired no territory within this state, by virtue of those treaties.

The right of exclusive legislation or jurisdiction, within the limits of any of the states, can be acquired by the *United States* only by purchase of territory from the states, for the

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purpose, and in the mode prescribed by the *Constitution* of the *United States*.

*THE PEOPLE against JOHN GODFREY.

THE prisoner was convicted, at the last court of *Oyer and Terminer*, held in the county of *Niagara*, of the murder of *Thomas Branaghan*. The record of conviction having been removed to this court, the prisoner was brought up, at the last term, on *habeas corpus*. Mr. Justice *Platt*, who presided at the trial, reported, that the murder was committed in the garrison of the *United States*, at *Niagara*, and that both the prisoner, and the deceased, were fellow soldiers in the army of the *United States*, serving in that garrison; and that doubts having been raised as to the jurisdiction of the court, sentence was not pronounced, in order that the prisoner might be brought before this court, for judgment. It appeared that the deceased was, for some military offence, ordered under guard; that the prisoner was corporal of the guard, and while the deceased was under his custody, in a place called the "black hole," within the walls of the garrison, the prisoner stabbed him with a bayonet.

Oakley, (Attorney General,) for the plaintiffs. It is said, that by the various treaties made between the *United States* and *Great Britain*, the land on which the fort and garrison of *Niagara* are situated, has been vested in the *United States*. Originally, the fortress of *Niagara* belonged to *France*, and passed, by the treaty of *Paris*, in 1763, to *Great Britain*. By the declaration of independence, and the subsequent revolution by which it was accomplished, the rights of the *British crown* to all the territory comprised within the state of *New-York* became vested in the people of this state, in full sovereignty, as a free and independent state. The constitution of this state recites the declaration of independence, and solemnly recognizes it. The powers and rights of the state emanate from the people alone, in their sovereign capacity, as a free and independent state, not from any treaty made with *Great Britain*. In the treaty of 1783, *Great Britain* treated with the *United States*, as sovereign *and independent. That treaty contains no words of *grant*, or cession, but merely recognizes the boundaries of this state, as an independent state. The *articles of confederation* expressly reserve the sovereignty of each state. It was a *league* between sovereign states. This state, then, had power to establish and hold military posts and fortifications, and the possession of these forts must be in its sovereign capacity. *Great Britain* held them hostilely, and by force; and when she surrendered the possession of the forts which she held within the boundaries of this state, they became, of course, vested in the state. This court cannot look

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beyond the state, for a source of title to any of its lands. (*Jackson v. Ingraham*, 4 *Johns. Rep.* 163.)

Again; by the *constitution of the United States*, (art. 1. sec. 8.) Congress have power "to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the *United States*, and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, dock yards, and other needful buildings." This shows, that the *United States* can exercise exclusive jurisdiction over such territory only as is acquired by purchase or cession from the several states. And this state, in all the grants or cessions which it has made to the *United States*, of lands for the use of the *United States*, has reserved the right of sending its officers to serve the process of its courts within the lands so granted. The *United States* possess no power or rights but such as have been delegated by the several states; and the states retain all the rights and attributes of sovereignty not expressly ceded to the *United States*. "The power of exclusive legislation," (which is jurisdiction,) says Chief Justice *Marshall*, (*United States v. Bevans*, 3 *Wheat.* 336. 388.) "is united with cession of territory, which is to be the free act of the states."

The treaties of 1783, and of 1794, contain no words of cession to the *United States*. It merely stipulates, that *Great Britain* shall withdraw its troops, &c. There was not, in fact, in 1783, any government of the *United States* *capable of receiving a cession of territory, or of garrisoning this fort. If it had been immediately surrendered, it would have been taken possession of by the troops of this state, as an independent state.

Again; it will be said, that there is an act of the legislature, (sess. 26. ch. 106. 1 *N. R. L.* 197.) authorizing the governor of this state "to agree with such person or persons as may be authorized by the *United States* for that purpose, for the sale of such quantity of the lands adjoining *Fort Niagara*, as shall be necessary for the accommodation of that fort, and to cede the right of the people of this state to the said lands to the *United States*," showing an implied admission that this fort then belonged to the *United States*. The fact, most probably, was not adverted to, at the time, that there never had been any cession of the land on which the fort is erected, to the *United States*. It is certain, however, that this court cannot presume any such grant. It is true, that Congress have provided for the punishment of crimes committed in places within the exclusive jurisdiction of the *United States*; but the *United States* have no exclusive jurisdiction, except what is acquired by grant or cession.

A doubt may, possibly, be suggested, whether the land on

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which *Fort Niagara* stands, is within the territory of this state. But it is well known, that the grant of *James II.* extended to the *Pacific Ocean*. The disputes between this state, and the states of *Massachusetts* and *Connecticut*, involved a discussion on this subject. By the convention between this state and *Massachusetts*, the jurisdiction was ceded to this state.

Again; by the act of the legislature of this state, passed the 19th of *February*, 1780, the delegates of this state to Congress were authorized to fix the limits of the territory of this state, and to cede to the *United States* all the lands beyond such limits; and the delegates to Congress did, accordingly, by a formal instrument, fix and describe the boundaries of the state, and cede to the united and confederated states, all lands and territories to the northward and westward of those boundaries; and this state has ever since held and enjoyed its territory according to those limits, and *which include *Fort Niagara*; there being no where mentioned any exception or reservation, in behalf of the *United States*, of any forts, &c. (Vide *Laws of the U. S.* Edition of 1815. Vol. 1. p. 467. 471.)

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Cady, for the prisoner. This question depends on the true construction of the clause of the constitution of the *United States*, as to its exclusive legislation. It is not essential to this power, there should be a cession of territory by a state to the *United States*. After the purchase of *Louisiana*, the *United States* exercised exclusive jurisdiction over the territory, and over all forts and places within its limits. When that country or any portion of it is erected into a sovereign and independent state, does the right of jurisdiction exercised by the *United States* over the forts continue, or must they purchase that right from the new state? It is not necessary that there should be a cession of jurisdiction, at the time of the purchase. Great inconvenience will arise, if the government and courts of the *United States* have not exclusive jurisdiction over these places. Every soldier in the garrison who commits a petty offence may be arrested by the warrant of a justice of the peace. The true meaning of the constitution is, that the *United States* cannot erect any fort or building on any part of the territory of a state, without its consent. As soon as the state grants to the *United States* the right of erecting a military fortress, the *United States* acquire an exclusive jurisdiction within such fortress, unless there has been some express stipulation to the contrary in the grant.

Again; has not this state, by its acts, virtually consented to give to the *United States* jurisdiction over this fort? Treaties have been made between the *United States* and the *Six Nations of Indians*, in 1784, 1789, and 1794, by which the latter cede to the *United States*, lands lying south of *Lake Ontario*, and south and east of *Niagara* river and *Lake Erie*, including

the fort of *Niagara*. (1 *U. S. Laws*, 307, 308, 309. 314. Ed. 1815.) Two of these treaties were made subsequent to the adoption of the constitution of the *United States*.

Again; *Great Britain*, afterwards, pursuant to the treaty *of 1794, surrendered the possession of this fort to the government of the *United States*, who immediately took possession of it, garrisoned it with their own troops, and have so kept possession, until this day; whether rightfully or not, makes no difference, for this state, having uniformly acquiesced in it, must be bound by such acquiescence.

In the case of the *Commonwealth of Massachusetts* against *Clary*, (8 *Mass. Rep.* 72.) the Supreme Court of that state decided, that the courts of that state had no cognizance of offences committed on lands in the town of *Springfield*, purchased by the *United States* from that state, for the purpose of erecting arsenals, &c.

Oakley, (Attorney General,) in reply, said, that the case of a cession of territory to the *United States*, by a *foreign* state, since the adoption of the present constitution, was not analogous to the present case. None of the *states* ever had any right to the territory so ceded. But very serious doubts have been entertained whether the government of the *United States* could, under the constitution, acquire new territory, and exercise jurisdiction over it; and though such cessions have been sanctioned by acts of Congress, it is not easy to discover on what *constitutional* grounds those acts can be supported.

As to the grants or cessions made by the *Indians* to the *United States*, it is a sufficient answer to say, that the *Indians* have never been recognized as the absolute owners of the soil, or as a source of title to lands in this state. Their right to the use of lands occupied by them has been admitted. But these very *Six Nations of Indians* had before ceded all their rights to *Great Britain*; and so, in truth, they had nothing to grant to the *United States*. There can be no source of title to land acknowledged, but what is derived from the state.

Again; the relinquishment, by *Great Britain*, of places occupied by her troops, gave no right to the *United States*. As well might the *United States* claim the city of *New-York* and its environs, which were surrendered pursuant to the treaty of peace, and taken possession of by the army of the *United States*.

Cur. adv. vult.

*The prisoner was again brought before the court, on *habeas corpus*; and the opinion of the court, on the question of jurisdiction, argued at the last term, was now delivered by the *chief justice*, as follows:

SPENCER, Ch J., (after stating the facts.) The question for

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the decision of this court is, whether the cognizance of this offence belongs to the courts of the *United States*, or to those of this state? It has been very ably argued, and the importance of the question has induced us to postpone a decision of it to the present term.

The jurisdiction of the courts of the *United States* must be derived under the eighth section of the first article and seventeenth paragraph of the constitution of the *United States*, which gives to the Congress "*exclusive legislation over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.*"

The only evidence of a purchase by the *United States*, of fort *Niagara*, from this state, or of a cession of any kind by it to the *United States*, is contained in the act of the 6th of April, 1803. (1 N. R. L. 197.) That act authorizes the governor to agree with such person or persons as shall be authorized by the *United States* for that purpose, for the sale of such quantity of the lands adjoining the fort *Niagara*, as shall be necessary for the accommodation of that post, and to cede the right of the people of this state to the said lands to the *United States*.

It does not appear, nor is there the slightest ground to believe, that the powers conferred on the governor, by this act, have ever been executed, or that any cession has ever been made under it, of the fort itself, or of the adjoining lands, to the *United States*.

It has been argued, that this state, though they have made no cession, have tacitly consented, by a necessary implication from the act of 1803, that the *United States* should hold the fortress of *Niagara*, and that in such case, the second paragraph of the third section of the fourth article of the constitution of the *United States*, would give to the Congress *the like exclusive power of legislation. That section declares, "*that the Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States, and that nothing in the constitution shall be so construed as to prejudice any claims of the United States, or any particular state.*"

The treaty of peace between the *United States* and *Great Britain*, in 1783, has also been brought into view, as containing provisions bearing on the question. That treaty contains a stipulation that his *Britannic* majesty should withdraw, with all convenient speed, all his garrisons from the *United States*, and from every post, place and harbor within the same; and the treaty of amity, commerce and navigation, concluded between *Great Britain* and the *United States*, in 1794, contains a stipulation, on the part of the former, to withdraw their troops and garrisons, from all posts and places within the boundary lines assigned by the treaty of peace, before the first

of *June*, 1796. Fort *Niagara* was captured from the *French*, in 1759, and passed, by virtue of the treaty of peace of 1763, to the crown of *Great Britain*; and has continued to be held by that power, as a fortress, until it was surrendered under the treaty of 1794, since which it has been possessed and garrisoned by the *United States*, with a short interruption during the late war, to the present period. That fort *Niagara* is within the acknowledged boundaries and limits of this state is indisputable.

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We consider it beyond all doubt, that the *United States* acquired no territorial rights to any portion of this state, in virtue of the treaties of 1783 and 1794. Neither of those treaties contain any words of grant to the *United States*, as such; nor should we have submitted to accept as a grant what had already been acquired by our arms, and established by the solemn declaration of independence. The Congress, under the articles of confederation, were the representatives of the several states; and, having the power to make war and peace, were a party to the treaty of peace, in behalf of the confederated states, and every stipulation in the treaty enured to the benefit of the states in their sovereign capacities. When, therefore, it was agreed, by the *treaty of peace of 1783, that *Great Britain* should withdraw, with all convenient speed, its garrisons from the *United States*, and from every port, place and harbor within the same; that agreement was for the benefit of the several states within whose limits those garrisons were. The section of the articles of confederation removes every doubt upon this subject: it provides, that "each state should retain its sovereignty, freedom and independence, and every power, jurisdiction, and right, which was not thereby expressly delegated to the *United States* in Congress assembled:" and it is not within our knowledge or belief, that the *United States* have ever claimed, or set up any pretension of property, to any fort within the boundaries of a state, under these treaties.

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The occupation of fort *Niagara*, by the troops of the *United States*, since its evacuation, in pursuance of the treaty of 1794, cannot be considered either as evidence of a right in the general government to the post itself, nor as an act hostile to the rights of this state. One of the great objects in the formation of a federal government was, that it should provide for the common defence. This post was considered an essential point to be garrisoned by the troops of the *United States*, as a security to our frontiers; and this state acquiesced tacitly in the propriety and necessity of the measure; under these circumstances to consider the occupation of the post as, *per se*, evidence of territorial right, in the *United States*, or as in hostility to the rights of this state, would be imputing to the federal government a disregard of its obligations and duties, and a spirit of violence and injustice, highly derogatory to its known justice and providence. Their possession of this post

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must be regarded, therefore, as a possession for the state, not against it; it was a friendly occupation, not in derogation of our rights; and we regard it as a fundamental principle, that the rights of sovereignty are never to be taken away by implication. In the case of the *United States v. Bevens*, (3 *Wheaton*, 388.) Chief Justice *Marshall* said, "the power of exclusive legislation under the 8th section of the first article of the constitution, which is jurisdiction, is united with cession of territory, which is to be the free act of the states." The correctness of this remark is fully admitted; and if the *United States* had the right of exclusive legislation over the fortress of *Niagara*, they would have also exclusive jurisdiction; but we are of opinion, that the right of exclusive legislation within the territorial limits of any state, can be acquired by the *United States* only in the mode pointed out in the constitution, by purchase, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. The essence of that provision is, that the state shall freely cede the particular place to the *United States*, for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously, or by disseisin of the state; much less, can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection.

The 3d section of the 4th article of the constitution of the *United States* is clearly adapted to the territorial rights of the *United States*, beyond the limits or boundaries of any of the states, and to their chattel interests, and it therefore drops the expression of exclusive legislation.

To oust this state of its jurisdiction to support and maintain its laws, and to punish crimes, it must be shown that an offence committed within the acknowledged limits of the state, is clearly and exclusively cognizable by the laws and courts of the *United States*. In the case already cited, Chief Justice *Marshall* observed, that to bring the offence within the jurisdiction of the courts of the union, it must have been committed out of the jurisdiction of any state; it is not, (he says,) the offence committed, but the place in which it is committed, which must be out of the jurisdiction of the state. It does not, therefore, enter into the consideration of this question, that the prisoner and the deceased were in the service of the *United States*, when the crime was perpetrated. On the whole, we are perfectly satisfied that the jurisdiction of this state attaches on the crime, and extends to the person of the prisoner, and nothing remains but that judgment be passed upon him according to law.

Sentence of death was, accordingly, pronounced on the prisoner.

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*BARKER *against* HAVENS.

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THIS was an action of *assumpsit*, brought to recover the freight and primage of ninety bales of cotton, shipped by the defendant, on board of the plaintiff's vessel, to be carried from *New-York* to *Liverpool*. The cause was tried at the *New-York* sittings, in *June* last, and a verdict taken, by consent, for the plaintiff, for 587 dollars, subject to the opinion of the court on the following case: The declaration stated, that the defendant, on the 1st of *July*, 1817, at the city of *New-York*, in consideration that the plaintiff, at his request, would take on board of the plaintiff's ship, called the *Loan*, ninety bales of cotton belonging to the defendants, and should safely carry the same in the said ship to *Liverpool*, in *England*, and there deliver the said ninety bales of cotton to the consignees thereof, to wit, Messrs. *Cropper, Benson, & Co.*, at *Liverpool*, agreeably to the bill of lading, the defendant undertook and promised the plaintiff to pay to him one penny sterling per pound weight, for the freight of the said ninety bales of cotton, and five per cent. thereon for the primage, which freight and primage amounted to 121*l.* 13*s.* 9*d.* sterling, equal in value to 570 dollars and 83 cents. The plaintiff averred that the 90 bales of cotton were delivered to *C. B. & Co.* on the 30th of *August*, 1817, according to the bills of lading, &c. The declaration, also, contained general counts for freight, work and labor, and *quantum meruit*.

Where the defendant, the owner of goods shipped them on board of the plaintiff's vessel, to be carried from *New-York* to *Liverpool*, and there delivered to C., the consignee, he paying freight for the same, with primage and average accustomed according to the bill of lading, signed by the master, who, on his arrival at *Liverpool*, delivered the goods to the consignee, without receiving the freight; though he afterwards demanded it, and the payment was refused. Held, that the plaintiff might maintain an action for the freight against the consignor. It seems, that where the goods are not owned by the consignor, nor shipped for his account and benefit, the carrier is not entitled to call on him for the

The master of the ship deposed, that the bills of lading were in the usual printed form, the cotton to be delivered to *C., B., & Co.*, of *Liverpool*, as consignees, they paying the freight as specified. The master did not demand payment of the freight before he delivered the cotton, nor any security for its payment. That after the cotton was delivered, he presented to *C. B., & Co.* a bill of the freight, which they refused to pay, on the ground of there being an open account between them and *Thomas R. Hazard & Co.*, of *Liverpool*. But they did not state that there was a balance *due to them from *T. R. H. & Co.* The master said it was usual at *Liverpool* to deliver cargoes before the freight was demanded or paid.

The defendant's counsel produced one of the bills of lading signed by the master, which stated, that the cotton was "to be delivered to *C., B., & Co.*, (the consignees,) they paying freight for the same, one penny sterling per pound, with primage and average accustomed." The account of *C., B., & Co.* with the defendant was also produced, from which it appeared that they had charged the defendant with the amount of the freight and primage, deducted the same from the proceeds of the cotton, and paid him the balance.

It was agreed, that if the court should be of opinion that the

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freight, on such a bill of lading. It is the duty of the master of a vessel, in all cases, to endeavor to get the freight from the consignee.

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plaintiff ought to recover interest at the rate of *seven* per cent., that then the sum of 34 dollars and 47 cents should be added to the amount of the verdict, and a judgment be entered accordingly.

Foot, for the plaintiff, contended, that the consignor of goods is liable to the ship owner, or carrier, for the freight, if the consignee refuses to pay it. In *Moore and others v. Wilson*, (1 *Term Rep.* 659.) it was held, that the contract or agreement between the consignor and consignee, as to the payment of the freight, did not vary the rights of the carrier, to whom the consignor was always liable for the freight. (*Tapley v. Martins*, 8 *Term Rep.* 451.) In *Shephard v. De Bernales*, (13 *East Rep.* 565.) Lord *Ellenborough* said, that the clause in the bill of lading, by which the master engages to deliver the goods to the consignee or his assigns, *he or they paying freight for the said goods, &c.*, was introduced for the benefit of the master only, not for the benefit of the consignee; and that, therefore, the master might, if he thought fit, waive the benefit of that provision, and deliver the goods without first receiving the freight; and that his doing so, did not prevent him from maintaining an action against the consignor for the freight. The same point was adjudged in the court of C. B. in the case of *Christy v. Row*, (1 *Taunt.* 299.) and the same principle is stated by *Abbot*. (3d *Ed.* 276. Part 3. ch. 7. s. 4.)

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The contract for the carriage of these goods was made in *New-York*; the plaintiff is, therefore, entitled to *interest* at *seven* per cent.

Henry, contra. By the bill of lading, in this case, the master engages not to deliver the goods until the freight is paid. The payment of the freight is made a condition precedent to the delivery. The law gives the master a *lien* on the goods for the freight, and he may detain them until it is paid. (12 *Mod.* 447. 511. per *Holt*, Ch. J. 1 *Molloy*, 376. B. 2. ch. 4. s. 12.) *Beawes*, *Lex Mercat.* 134. *Abbot on Ships, &c.* Part 3. ch. 3. s. 12.) Could the *master* himself, having signed such a bill of lading, maintain an action for the freight against the consignor of the goods? Might not the latter say, "By your contract you engaged to receive the freight of the consignee; and, having voluntarily delivered the goods, without doing so, you must take the consequence?" If the master could not, neither can the owner of the ship, maintain this action; for the principal can be in no better situation than his agent, for whose conduct he is answerable. (*Abbot*, Part 2. ch. 2. s. 2, 3, 4. 6. *Molloy*, B. 2. ch. 2. s. 14.) Suppose there had been a settlement of the accounts between the defendant and the consignees, and the freight had been credited, as if it had been paid. There was not sufficient evidence of any commercial usage at *L.* on this subject. (1 *Caines's Rep.* 45.)

The contract was to be performed in *England*, where the freight was to become due and payable; the interest, therefore, is to be regulated according to the law of that country.

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Foot, in reply. Suppose the goods arrive at the port of destination, in so damaged a state as not to be worth half the freight, if the consignee refuses to pay the freight, and the goods are landed and sold, is not the consignor of the goods liable to the ship owner for the freight? (a)

*SPENCER, Ch.-J., delivered the opinion of the court. The plaintiff's right to recover freight, depends on the legal import of the clause in the bill of lading, by which it is stipulated, that the goods should be delivered to *Cropper, Benson, & Co.* "they paying freight for the same, one penny sterling per pound, with primage and average accustomed."

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The effect of this clause has been repeatedly considered in the *English* courts, and the decisions have been uniform in both the King's Bench and Common Pleas. In *Shephard v. De Bernales*, (13 *East*, 508.) Lord *Ellenborough* examined all the cases, and he considered the clause introduced for the benefit of the carrier of the goods only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad, before he should make delivery of the goods; and that he had a right to waive the benefit of that provision in his favor, and to deliver, without first receiving payment, and was not precluded, by such delivery, from afterwards maintaining an action against the consignor. He observes, that the cases he cited, proved that such a clause did not, in general, cast the duty on the captain, at his peril, of obtaining freight from the consignee; but that if he could not get it from him, he may insist on having it from the consignor. He admits, that the rule might be otherwise, in a case, differently circumstanced; and he lays stress on the fact, that the delivery was to be to the correspondents, factors and agents of the defendant. I should clearly be of opinion, that if it appeared that the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, that the carrier would not be entitled to call on the consignor for freight; and I should incline to the opinion, that, in all cases, the captain ought to endeavor to get the freight of the consignee. In the present case, there can be no doubt that the cotton was the property of the defendant when shipped, and that it was consigned to *Cropper, Benson, & Co.* to be sold on the defendant's account; for he exhibited *Cropper, Benson, & Co.*'s account,

(a) If the consignee accepts the goods, he is bound for the freight, though the damage exceeds the amount of freight. (*Shield v. Davis*, 6 *Taunt.* 65.) The goods, though of no value, cannot be abandoned for the freight. (*Griswold v. New-York Ins. Co.* 3 *Johns. Rep.* 321. *Poth. Ch. Part.* n. 59.) The goods are only an additional security for the freight; and the responsibility of the owner or shipper of them for the freight, remains entire. (3 *Johns. Rep.* 328, 329.)

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*by which it appeared, that the defendant was charged with the freight and primage, which had been deducted from the proceeds of the cotton, and the balance had been paid to the defendant. It is evident, however, that *Cropper, Benson, & Co.* never paid the freight, on being required by the captain to do so, after the delivery of the cotton, but declined to pay it, on the ground, that they had an open account with *Thomas R. Hazard & Co.*, of *Liverpool*. As this case stands, we think the decisions referred to in 13 *East* are in point; and whilst we feel that, on a commercial question, they are entitled to high respect, there is a peculiar fitness that the general rules regulating commercial negotiations should be uniform, where no principles of law stand in the way; and we think there are none in the present case.

The rate of interest ought to be five per cent.; for the contract was to be executed in *England*, and the plaintiff had a right to demand and insist on payment there.

Judgment for the plaintiff accordingly.

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B. being possessed of a term of years, in *England*, of which 1690 years remained unexpired, sold and assigned to P. the same, for 1600 years, at a yearly rent, &c. P. sold and assigned the same to the defendant, who covenanted to perform, &c. all the covenants, &c. contained in the indenture of demise from B. to P., and on the part of P. to be performed, &c. In an

action of covenant, by P. against the defendant, to recover the amount of rent alleged to be due and unpaid to B. for above 24 years; the defendant pleaded, that before any rent accrued or became payable to the lessor, he assigned all his interest, term, &c. to G., who entered into possession of the premises, and was accepted by B. as his tenant. *Held*, on demurrer, that the plea was bad. That the covenant, on the part of the defendant, was a positive and express covenant to pay the rent, as it should become due to the lessor, and for which the plaintiff remained liable on his covenant to B., by *privity of contract*, notwithstanding the assignment, by the defendant, to G. and the acceptance of him by B. as his tenant: That it is not necessary that the plaintiff should allege in his declaration, or reply, that he had been obliged to pay the rent to B., or had been damnified; for the defendant's covenant is broken by the non-payment of the rent, and *non damnificatus* is no answer to the plaintiff's declaration; and that the plaintiff is, therefore, entitled to recover the whole rent in arrear and unpaid, for which he was liable on his covenant with the lessor.

therein mentioned, demised, granted, bargained, sold, and assigned to the defendant, his executors, &c. the same lot of land, &c. for the residue of the term of 1600 years, then unexpired; and that the defendant, in and by the same indenture, covenanted with the plaintiff, his executors, &c., that he, the defendant, would well and truly observe, perform, fulfil, and keep all and every the covenants, conditions, provisoes, payments, and agreements, mentioned and contained in the first-mentioned indenture of demise, and which, on the part and behalf of the plaintiff, &c., were or ought thereafter to be paid, done, and performed, &c. The plaintiff then alleged that the defendant, although often requested, had not paid the sum of £332 1s. 3d. lawful money of *Great Britain*, of the said yearly rent, for twenty-four *years and a half, commencing from the 29th of *September*, 1793, and ending the 25th of *March*, 1818, and which sum, on that day, was in arrear and unpaid to *T. Barlow*, his executors, &c., but to pay the same, had refused, &c., and the same still remained wholly due and unpaid, &c.; and that the defendant, although often requested, &c., had not kept the said covenant, &c.

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The defendant pleaded six pleas: 1. *Non est factum*, as to the indenture first mentioned: 2. *Non est factum*, as to the second indenture. 3. *Non est factum*, as to the assignment thereof. 4. That, after making the indenture of assignment, mentioned in the plaintiff's declaration, by which the defendant became assignee of the said term of 1600 years, &c., and before any rent became due or owing under the said lease to *Thomas Barlow*, to wit, on the 1st of *September*, 1792, at *Manchester*, &c., the defendant by indenture, for the consideration therein mentioned, bargained, sold, and assigned all the right, title, interest, and term of years, then to come and unexpired, of and in the demised premises, unto one *Charles Graham*, by virtue of which assignment, the said *C. G.* afterwards, to wit, on the 1st of *September*, 1792, entered into the demised premises, &c., and became possessed thereof, for the residue of the said term then to come therein and unexpired, whereof the plaintiff then and there had notice, &c. And that after the entry of the said *C. G.* into the demised premises, by virtue of the said assignment, to wit, on the day and year last aforesaid, the said *T. Barlow* did, then and there, accept the said *C. G.* as his tenant of the said demised premises, &c., and this the defendant is ready to verify, &c. 5th. That, after making the indenture of assignment in the declaration mentioned, and before the exhibiting of the plaintiff's bill, to wit, on the 1st of *January*, 1795, at *Manchester*, &c., the plaintiff then and still being a subject of *G. B.* and residing in *England*, became a bankrupt within the true intent and meaning of the several statutes of *G. B.* then in force concerning bankrupts, and the sum of money or cause of action in the plaintiff's declaration mentioned, was assigned and transferred, according

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to the true intent and meaning of the said several statutes then in force concerning bankrupts, *to the assignees of the plaintiff, for the use and benefit of the said assignees, and all other the creditors of the plaintiff, by reason whereof, and by force of the said statutes in that case made and provided, the said assignees, then and there, became, and were, and still are, entitled to the said debt, sum of money, or cause of action, in the said declaration mentioned, &c. And this the said defendant is ready to verify, &c. 6th. Payment, on the 25th of *March*, 1798, by the defendant to *T. B.* of £188 17s. 9d. sterling, with interest, in full satisfaction of the rent then due and in arrear from the defendant; with a verification. The plaintiff *demurred* to the 4th and 5th pleas, and the defendant joined in demurrer.

J. Paine, in support of the demurrer. The fourth plea is bad. As this action is brought on the express covenant of the defendant, that he would perform and keep all the covenants, &c. contained in the indenture of demise from *B.* to the plaintiff, the assignment of the residue of the term by the defendant to *Graham* is no defence, for the plaintiff still continues liable for the rent, under the covenants contained in the original indenture from *B.* Though the lessor, who accepts the assignee of a term, cannot maintain *debt* against his lessee, for that goes on the *privity of estate*; yet he may maintain *covenant*, for that is by *privity of contract*. This has been a long established distinction in the law. (*Cro. Car.* 309. 334. 579. 4 *Mod.* 81. 3 *Salk.* 48. *Auriol v. Mills*, 4 *Term Rep.* 98. 1 *Hen. Bl.* 445. 2 *Johns. Cas.* 19. 1 *Dallas*, 305. 1 *Saund.* 241. b. ff. (5) 2 *Bac. Abr. Cov.* (E. 4.) 1 *Chitty's Pl.* 36. 106. 112.)

Again; the 5th plea is bad. The claim is founded on a contingency, and contingent claims do not pass under a bankrupt's assignment. (2 *Str.* 869. 1053. 1163. 1 *Bac. Abr. tit. Bankrupt*, F. 1 *Chitty Pl.* 510. 1 *Term Rep* 623. 1 *Dallas*, 60. 3 *Bos. & Pull.* 40.)

But this plea is bad according to the principle laid down in *Bird v. Caritat*, (2 *Johns. Rep.* 342.) that this court do not recognize the assignees of a foreign bankrupt, so far as to permit a suit to be brought in their names.

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**Hoffman*, contra, admitted, that the fifth plea was bad; but contended, that the fourth plea was good. From the very nature of the case, the plaintiff, before he can be entitled to maintain this action, must show, that the lessor, *Barlow*, had called upon him for the rent, and compelled him to pay it. Here was an express acceptance of *Graham*, the assignee, as tenant, twenty-seven years ago. The plaintiff ought to have replied, that the rent had never been paid by the defendant's assignee, who was liable, on the privity of estate, to pay it.

An assignee of a term is bound to perform all the covenants annexed to the estate. (2 *Bac. Abr. Covenant*, (E. 3.) 3 *Term Rep.* 393.) The law implies a covenant to pay the rent to the lessor. There was no occasion for an express covenant; nor does the insertion of covenants vary the nature and effect of the assignment. (*Palmer v. Edwards*, *Doug.* 187. note.) The lessor, by reason of the privity of estate, may have debt or covenant for rent, against the assignee of the term. (1 *Saund.* 241. b. n. 5. n. 6.) This covenant amounts merely to a covenant to indemnify the assignor.

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Again; this action is, in its nature, *local*, and cannot be maintained here, but should have been brought in *England*, where the premises are situated. (1 *Saund.* 241. b. n. 6. 4 *Term Rep.* 98. 503. 1 *Chitty's Pl.* 275. 1 *Shower*, 199.)

Paine, in reply. The declaration alleges, that the rent is due, in arrear, and unpaid, to *B.*, contrary to the defendant's covenant. It was not, therefore, necessary, that the plaintiff should have replied to the fourth plea, that the defendant's assignee had not paid the rent to *B.* The plea does not allege, that the assignee has paid the rent.

The covenant is, that the defendant would pay the rent to *B.* during the continuance of the term, as the same should become payable. The plaintiff is, therefore, entitled to an action on the covenant, to recover any portion of the rent which the defendant may have suffered to remain due and unpaid, after the day of payment has elapsed. (2 *Term Rep.* 100. 640. 7 *Term Rep.* 93. 3 *Comyn's Dig.* 266.)

This is not a covenant to indemnify, or save harmless *the plaintiff against his own covenant. *Non damnificatus*, therefore, is no answer to the declaration. (1 *Saund.* 116. 1 *Bos. & Pull.* 638.)

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The action of covenant, as between the parties to the contract, is always *transitory*. (1 *Saund.* 241. b. n. 6.)

VAN NESS, J., delivered the opinion of the court. The fifth plea being admitted to be bad, the first question is, whether or not the fourth plea can be supported? The facts stated in that plea, are, that before any of the rent, reserved in the lease, fell due, the defendant had duly assigned all his interest in the demised premises to *Graham*, and that *Barlow*, the lessor, had accepted *Graham* as his tenant. The validity of this plea depends upon the construction to be given to the defendant's covenant contained in the assignment to him by the plaintiff, and the nature and extent of the obligation which that covenant created. It is substantially a covenant, on the part of the defendant, that he will pay to *Barlow*, the lessor, the rent reserved by the lease, from time to time, as it shall become due. It was made with the plaintiff, and he only can maintain an action upon it, in case of non-performance; it is not a

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covenant made with *Barlow*, the lessor, nor for his benefit, nor can it be enforced by him. For, although the defendant so long as he continued to be the owner of the term under the assignment, was liable for the payment of the rent to the lessor yet such liability was not created by the covenant in question, but by the covenant in the lease. He was answerable as assignee of the term, not upon any privity of contract, but upon the privity of estate; and he would have been equally liable if no such covenant as that in question was contained in the assignment.

The plaintiff continued answerable for the payment of the rent, notwithstanding the assignment to the defendant, even if the latter had been received and accepted by the lessor as his tenant. This principle has been firmly settled for centuries, and is no longer to be drawn in question.

When a landlord gives a lease, he selects his tenant; he trusts to the skill and understanding of that tenant; and it cannot be endured, that he should afterwards be deprived of his action on the covenant to which he trusted. (*Auriol v Mills*, 4 Term Rep. 98.) The lessee, having a right to sell, may bring in a tenant altogether incompetent to the proper management of the land, and the payment of the rent; and he again may sell to another person still more objectionable. The same reason why the lessor's right to resort to the lessee for the payment of the rent, is preserved after assignment, applies to the case of the lessee when he sells to another. The lessee continuing to be liable, he selects his successor with a view to the future punctual payment of the rent, and, trusting to the responsibility of the person to whom he sells, he takes from him such security, by way of covenant, or other wise, as shall bind him to pay the rent, notwithstanding any future alienations that may be made of the land. Covenants of this kind are both usual and proper, and suits upon them are not without precedents. The case of *Atkinson's Executor, &c. v. Coatsworth*, (8 Mod. 33.) is, in all essential respects, like the present, and the words of the covenant are almost precisely the same. This case will be noticed presently for another purpose. The case, also, of *Mayor v. Steward*, (4 Burr. 2439.) was upon a covenant substantially like the one in this case. The defendant pleaded his discharge under the bankrupt law; but the court, after great consideration, gave judgment against him. It was held, that notwithstanding the defendant had been divested of all his interest in the land, under the commission of bankruptcy; still, having entered into an express covenant, he was bound for the rent that subsequently accrued. It was observed, that it was not a case between lessor and lessee, but a distinct, detached, collateral, independent covenant between the plaintiff and the defendant. It was his own express collateral covenant, not a covenant that runs with the land. What I have said, and the cases that

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have been referred to, show, that the assignment by the defendant to *Graham*, and the acceptance by the lessor of *Graham*, as his tenant, do not discharge the defendant from this covenant, and that his liability does not arise out of the privity of estate, but the privity of contract; and this is an answer to the objection that has been made, that this action is local, the covenant *having been made in *England*, and that no suit, therefore, can be maintained upon it, in the courts of this state. The suit is brought on the express covenant, which remains in full force after the land is gone, and is founded on a privity, collateral to the land. (*Mills v. Auriol*, 1 *Hen. Bl.* 443.) Like every other personal agreement, it is transitory in its nature, and may be tried here, though arising out of a transaction abroad. (*Doulson v. Matthews et al.* 4 *Term Rep.* 503.) *Debitum et contractus sunt nullius loci.* (7 *Co. Rep.* 3. *Bulwer's case.*)

The plea, therefore, must be considered bad; but the counsel for the defendant, as he has a right to do, has taken an exception to the sufficiency of the declaration, which it, therefore, becomes necessary to consider. The plaintiff has not averred that he has been damnified by the breach of the covenant, on the part of the defendant, in having, either voluntarily or compulsorily, paid the rent in arrear. The declaration contains an averment, that the rent, to a certain specified amount, and for a term specified therein, is yet in arrear, and unpaid, to the lessor, *Barlow*, and the breach assigned, is for the non-payment thereof by the defendant. It is argued, on the part of the defendant, that, until the plaintiff has paid the rent, he cannot maintain an action at all, or, in other words, that the covenant is not broken until the plaintiff has satisfied the rent. This is a mistake. The covenant is, that the defendant shall pay the rent to the lessor as it falls due, and the moment the day of payment is past, and the rent is left unpaid, the covenant is broken, as well according to its words as its spirit, and the action is, at all events, maintainable.

Another question then arises, what shall be recovered? Nominal damages only, or the amount of the rent due? My opinion is, that the latter is recoverable. The covenant is not that the defendant shall indemnify the plaintiff against his own covenant in the lease, or against any damage which he may sustain, but it is express and positive, that the defendant will pay the rent, for which the plaintiff continued to be liable, notwithstanding the assignment; the sum to be paid is certain and liquidated, and the breach of the covenant consists in the non-payment of it, and a plea of *non *damnificatus* would, therefore, be no answer to the declaration. The contract between the parties amounts to a covenant, on the part of the defendant, to pay a present debt of the plaintiff which would become payable, from time to time, to *Barlow*, the lessor; and

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it would be against all reason and justice to permit the defendant to say, that the plaintiff shall himself first pay and advance the money, before his right of action against the defendant to recover it arises. This was not the intent of the parties, nor the legal effect of the contract; and the very reason for inserting this covenant was to guard against the necessity of the plaintiff's paying the rent, before he would be in a situation to recover it from the defendant, on his default. If the plaintiff had, from time to time, as the rent fell due, paid it to the lessor, he might have recovered it back from the defendant or his assignees, in case he had assigned it, as so much money paid for his or their use; and no such covenant as that contained in the lease was necessary, if the construction of it be such as is contended for on the part of the defendant. The very insertion of this covenant shows, that something more was intended, and that, no doubt, was, that the plaintiff should have his remedy upon it against the defendant, the moment he exposed the plaintiff to a suit by not paying the rent as it fell due. Suppose a covenant is entered into by *A.* with *B.*, that he will pay *B.*'s bond to a third person, when it falls due, there cannot be a question that if *A.* makes default, he is liable for the amount of the bond, though *B.* has not paid it himself. A reference to a few adjudged cases will show, that this view of the effect of the covenant is well founded. In the case of *Holmes et al. v. Rhodes*, (1 *Bos. & Pull.* 638.) a suit was brought upon a counter bond, given by way of indemnity to the plaintiffs, conditioned for the payment by the defendant of a certain sum of money on the day it fell due, according to the terms of the principal bond, to a third person, and which had been executed by the plaintiffs as the defendant's sureties. The defendant pleaded *non damnificatus*, and the court held, that the plea was no answer to that part of the condition by which the defendant had undertaken to pay the sum for which the plaintiffs had bound themselves, and was, therefore, *bad. In a note to the case of *Cutler et al. v. Southern et al.*, (1 *Saund.* 116. note 1.) Serjeant *Williams* takes this distinction, which is fully supported by the cases to which he refers, namely, the plea of *non damnificatus* cannot be pleaded where the condition is to *discharge or acquit* the plaintiff from such a bond, or other particular thing, for there the defendant must set forth, affirmatively, the special manner of performance. But it is otherwise where the condition is to discharge and acquit the plaintiff from any damage by reason of such bond or other particular thing, for that is, in truth, the same thing with a condition to indemnify and save harmless.

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The principle established in those decisions where it has been held that if a bond be conditioned for the payment of money at a certain day, though really given by way of indemnity, and that fact appearing on the face of it, the debt accrues

from the day mentioned in the condition, and does not await the damnification, is strictly analogous to the case before us. (*Toussant et al. v. Martinnant*, 2 Term Rep. 100. *Martin v. Court*, 2 Term Rep. 640. *Hodgson et al. v. Bell*, 7 Term Rep. 97.) The case before cited, of *Atkinson's Executor v. Coatsworth*, is also in point, to show, not only that this action is maintainable, but, also, that the amount of the rent due is the proper rule of damages. In that case, the rent reserved by the lease *not being paid*, the action of covenant was brought against the under-tenant, and the breach assigned was the *non-payment of the rent*, to which the defendant pleaded the general issue; the cause was tried, and the plaintiff had a verdict and judgment. Upon a writ of error by the defendant, the judgment was affirmed, and though other errors were assigned, it was not even suggested, that the plaintiff could not recover, because no averment was contained in the declaration, that the plaintiff had paid the rent. The opinion of the court, accordingly, is, that the plaintiff is entitled to judgment on the demurrer.

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Judgment for the plaintiff. (a)

(a) Vide post, 479. Same case, affirmed, in error.

*WOLCOTT, administratrix of WOLCOTT, against VAN SANTVOORD. [* 248]

THIS was an action of *assumpsit* against the defendant, as acceptor of an inland bill of exchange, dated *Utica*, the 2d of *July*, 1818, drawn by *Soulden & Smith*, directed to the defendant, requesting him, five months after date, to pay to *Solomon Wolcott*, (the intestate,) or his order, at the *Bank of Utica*, the sum of \$2,942 and 43 cents, in current money of the city of *New-York*, for value received, &c., which bill was duly accepted by the defendant, on the 3d of *July*, 1818. The declaration contained two counts, on the bill and acceptance, and also the usual money counts. The first count set forth the bill as payable at the bank of *Utica*. The declaration contained the general conclusion, that the defendant, although often requested, &c., had not paid, &c., without averring any demand at the bank of *Utica*, or at any particular place. The defendant demurred to the first count, and the plaintiff joined in demurrer. To the other counts the defendant pleaded *non assumpsit*.

The demurrer was submitted to the court without argument.

SPENCER, Ch. J. The demurrer in this case has been interposed to the first count in the declaration, on the ground,

to damages and costs, but not to the

In an action by the payee of a bill of exchange against the acceptor, where the bill is drawn payable at a particular place, and accepted, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed; but the defendant, if he means to avail himself of the want of such demand, must plead that he was ready, at the time and place appointed, to pay, but the plaintiff did not come there, &c., which defence goes only to damages and cause of action

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that the bill is made payable at the bank of *Utica*, and that there is no averment that it was presented there on the day it became payable. The inquiry, then, is, whether such an averment is necessary to sustain the plaintiff's right of action; or whether the defendant is not bound to plead, in bar of the damages, that he was ready, at the time and place, when and where the bill became due, to pay it, and that he has ever since been ready, and now brings the money into court to be paid to the plaintiff?

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This question appears to have been already decided by this court, in *February* term, 1809, in the case of *Foden *and another v. J. & R. Sharp*, (4 *Johns. Rep.* 183.) In that case, the plaintiffs drew a bill, at *Manchester*, in *England*, payable to themselves or order, on the defendants; and J. S., the partner of the other defendant, being in *England* at the time, accepted the bill, in the name of the firm, to be paid at a mercantile house in *London*. It was protested for non-payment, and the protest stated, that a demand of payment had been made of a clerk of the house in *London*, where the bill was payable, according to the acceptance; but did not state a demand of the defendants. The court said, "That the holder of a bill of exchange need not show a demand of payment of the acceptor, any more than of the maker, of a note. It is the business of the acceptor to show, that he was ready, at the day and place appointed, but that no one came to receive the money, and that he was always ready, afterwards, to pay." And such, it is believed, was the doctrine of the *English* courts, at that time. But it appears, that there have since been contradictory decisions in *Westminster Hall*; and distinguished judges have changed opinions, before held by them as clear and unquestionable; and we are now called upon to follow them in those changes. Admitting that, amidst these contradictory and fluctuating decisions, the question would be perfectly open to us, it would, then, become necessary to develop the principles adapted to the case, and to give effect to them, rather than to follow the oscillations of the *English* courts. And, considering the great diversity of opinion on the subject, it may not be time misspent to examine the leading cases which have been decided in that country.

In *Ambrose v. Hopwood*, (2 *Taunt. Rep.* 60.) it was decided, that, in an action against the drawer of a bill of exchange, when the bill was general, but the acceptance was to pay it at a particular place, it was necessary to aver a presentment of the bill at that place. The same decision was made in *Callighan v. Aylett*, (3 *Taunt.* 397.) In *Saunderson v. Bowes and others* (14 *East*, 498.) in *Dickinson v. Bowes and others*, (16 *East* 108.) and, again, in *Bowes v. Howe*, in the *Exchequer Chamber*, (5 *Taunt.* 30.) it was decided, that in an action on a note, by the payee or bearer, against the maker, where the place of payment was embodied *in the note, it was a con

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dition precedent, that it should be presented for payment at that place, and an omission to aver such presentment in the declaration, was fatal in arrest of judgment, or in error.

In the case of *Nichols v. Bowes*, (2 *Campb. N. P. R.* 498.) in an action against the maker of a note, payable at a particular place in *London*, Lord *Ellenborough* expressed himself clearly of opinion, that the place of payment was merely to be considered as a memorandum where payment was to be demanded, and not a part of the contract; that the maker of a note was liable every where, and, as against him, the bringing of the action was a sufficient demand; and, upon the plaintiff's counsel offering to prove that the note was presented at the banker's, on the day it became due, his lordship observed, that he was afraid to admit such evidence, lest doubts should arise as to its necessity. In the case of *Lyon v. Sundius & Sheriff*, (1 *Campb. N. P. R.* 423.) in an action against the acceptor of a bill, accepted payable at *Hankey & Co.'s, London*, Lord *Ellenborough* observed, that the place of payment was a mere memorandum; that the acceptor was liable universally; and that the very point had been previously brought before the court, when the judges were all of opinion, that such words formed no part of the contract. In *Wild v. Rennards*, in a note to 1 *Campb. N. P. R.* 423., Mr. Justice *Bayley* ruled, that if a note is made payable at a particular place, in an action against the maker, there was no necessity for proving it was presented there for payment. In *Trapp v. Spearman*, (3 *Esp. Rep.* 57.) a bill had been altered in the place of payment, by inserting, "when due, at the cross keys-road;" and Lord *Kenyon* pronounced the alteration immaterial, as only pointing out the place where the bill was to be paid. In *Kershaw and others v. Cox*. (3 *Esp. Cas.* 246.) *Le Blanc*, Justice, held the same doctrine; and in *Marson v. Petit*, (1 *Campb. N. P. R.* 82.) Lord *Ellenborough* adopted the same principle. In *Fenton v. Goundry*, (13 *East's Rep.*) decided since the cases in 2d and 3d *Taunton*, the question underwent a solemn examination. That was an action against the acceptor of a bill, accepted to be paid at *C. Sikes, Snaith & Co.*, and there was no averment of a demand *at that place; and, on demurrer, the omission to make that averment was assigned as cause. The opinions of Lord *Ellenborough*, and *Grose* and *Bayley*, Justices, are very full and decided, that the acceptance to pay the bill at a particular place is not a part of the contract, or a condition precedent. Lord *Ellenborough* said, that since he had been familiar with the practice and doctrine concerning bills of exchange, he had always understood, that an acceptance, though stated to be payable at a certain house of trade, binds the party to pay the bill generally and universally, and that there was no occasion to make a demand at the particular place, in order to found the right of action on the bill. He referred to a case of *Smith v. Delafontaine*, in which Lord *Mansfield* was of opinion, that no proof of a pre-

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sentation at a particular house of acceptance was necessary. In *Saunderson v. Judge*, (2 H. Bl. 509.) when the maker of a note, at the foot of it, made a memorandum, that the note would be paid at the house of *Saunderson & Co.*, the court held it to be no part of the contract, and not necessary to be stated in the declaration. Thus stand the cases.

It is necessary, first, to inquire in what light the acceptor of a bill is to be regarded, whether as the principal debtor, or merely coming in collaterally to the drawer. It does not admit of a doubt, that, as between the payee and the drawer or acceptor, the acceptance creates a debt, *quasi ex contractu*. The drawer is presumed to draw upon funds in the hands of the drawee; the payee is presumed to have given a full value for the bill; and when the drawee accepts the bill, he becomes an immediate debtor to the payee, as upon a valuable consideration paid to the drawer, upon his funds in the hands of the acceptor. (*Wilson*, 185. 3 Burr. 1663. 2 Bl. Rep. 1072 Doug. 237. 250. n. 2 Campb. 187. in the notes.) It is true that the payee has his remedy against the drawer, in case the bill be not paid pursuant to the engagement of the acceptor; the remedy is, however, concurrent against the drawer and the acceptor; and, in this respect, the acceptor stands in the same relation to the payee, as the maker of a note does to the endorsee; and the drawer is regarded in the light of an endorser of a note. By the act of acceptance, it not appearing to be for the *accommodation or for the honor of the drawer, the defendant became a principal, and not a collateral, debtor. What, then, is the legal consequence of not presenting the bill at the time and place it was payable? If it was a condition precedent to the liability of the acceptor, it must be emphatically so, as regards the drawer; and the result would be that a failure to present the bill at the time, or at the place, would occasion a total loss of it to the holder; for if it cannot be recovered in an action on the bill itself, in consequence of an omission to aver a presentment at the time and place, no other form of action will lie, when that proof cannot be made. The reasoning of the judges, in *Fenton v. Goundry*, appears to me unanswerable. Lord *Ellenborough* said, the law was the same as to the demand of payment on other securities. The making a bond, payable on demand, at *Lincoln's Inn* hall, is no such term in the contract, as to make it necessary, in an action on the bond, to allege a demand at that place, in order to found the right of action; but if the obligor were ready with his money there at the day, he must plead it as matter of defence; and he adds, that he never could conceive that the obligation to pay, which is universal on the acceptor, is to be contracted and limited in its origin, by saying that the bill was only payable at the particular place mentioned. *Bayley*, J., observed, "besides, if this were to be taken to be a place fixed on by the contract for the payment of the money, and if the defendant

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had his money there, ready to pay it, if demanded, he might have pleaded, that he had the money at the day and place appointed; and bringing the money into court; and that would not be a plea in bar of the action, but in bar only of damages; as in the case of rent payable on the land, if the tenant were on the land, at the day, ready to pay the money, he may, when sued for non-payment, plead that in bar of the damages, upon bringing the money into court."

The non-attendance of the holder of the bill, at the time and place of payment, can produce no worse consequences to him than if he had attended, and the acceptor had also been present and tendered the money, which the holder had refused to accept. Under such a state of facts, what *is the legal consequence? It is perfectly well settled, that, when a debt or duty exists, such as the payment of a sum of money, a tender of the money, though it be refused, does not extinguish the debt or duty; but it remains obligatory on the party owing the debt or duty: as if an obligation be for the payment of a less sum, this being a duty and part of the obligation shall not be lost by tender and refusal, for if he pleads a tender, he shall say *uncore prist*. (*Com. Dig. tit. Condition, L. 4. Co. Lit. 207. a.*) In *Giles v. Hartie*, (1 Lord Raym. 254.) Holt, Chief Justice, ruled, that, though a tender is made and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, neither in debt nor assumpsit, but in bar of the damages only; for the debtor shall, nevertheless, pay his debt. This is a principle too familiar to every lawyer to require a statement of the numerous authorities to support it. Nor is it necessary, where a regular tender has been made, and a refusal to accept it, for the plaintiff to make a special demand subsequently, and before he brings his action; the action itself is a demand. If the payee or obligee make a special demand, after a tender and refusal, and the money be not then paid, he becomes entitled to interest from the time of such demand; but in case he brings a suit before or without a special demand, the defendant, by pleading his tender, and bringing the money into court, avoids all damages, as well subsequent interest, as costs.

It is perfectly certain, that the Exchequer Chamber (in *Bowes v. Howe*) did not proceed on the ground that the debt demanded was a collateral obligation or promise. They not only do not say so, but the case did not admit of their saying so, for the action there was against the makers of a note payable at the *Workington Bank*; and I never can conceive that decision to be law, that a mere failure to present a note at the time and place of payment, and making a demand, shall exonerate the party for ever, though the debt or duty remains; the principle of it is, that the undertaking was a condition precedent, and that the duty could not be enforced without a strict compliance with the condition; and it goes the whole length of deciding,

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that even a subsequent demand, or any other form of action, *would be ineffectual. (a) For if the condition must be averred and proved, and there has, in fact, been no demand, the holder of the note must be remediless. From such a doctrine I entirely dissent, and must think that the time and place of payment are merely *modal*, forming no essential part of the contract; that it is incumbent on the defendant, whether the payee was at the place at the time appointed or not, to show, in his defence, that he was there ready and willing to pay, and that the payee did not come, &c.; that the consequences of the absence of the payee, under such circumstances, unless he makes a subsequent special demand, and there be then a refusal, are, merely, that he must be content with receiving the sum originally payable, and if he sue, without having made a special demand, he loses all claim to damages and costs, and will himself be subject to them. This I consider not only entirely equitable and just, as between the parties, but the old and settled law of the land: and such was the opinion of the court in *Foden v. Sharp*. I am, therefore, of opinion, that the plaintiff is entitled to judgment. (b)

YATES, J., and PLATT, J., were of the same opinion.

VAN NESS, J. The question presented by the demurrer to the declaration in this cause, is highly interesting to the commercial community; and if it were now to be decided, for the first time, I am not certain that the weight of argument would be very decidedly against the opinion which has just been delivered. The same arguments, however, which have been urged in support of the conclusion formed by a majority of this court, have, in a variety of cases, which will presently be cited, been addressed to the *English* courts; and although, at one time; there was a difference of opinion between the *King's Bench* and the *Common Pleas*, it cannot be denied, that since the case of *Saunderson v. *Bowes*, both courts are agreed, that, where there is a particular place of payment inserted in the bill, or note itself, it is necessary to aver a presentment at that place, though they may still differ as to the case of an acceptance, payable at a particular place. The *English* rule, beyond all dispute, is, that to charge any of the parties to a note of hand, or a bill of exchange, made payable in the body of the instrument, at a designated place, it is indispensably necessary that a

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(a) Lord *Ellenborough* said, "if the action for money lent, or money had and received, would lie merely upon the evidence of the note in question, let the plaintiff bring such an action." But if there has been such a *laches* on the part of the holder, that the maker is discharged, can the plaintiff resort to evidence on the common counts?

(b) In declaring on a promissory note, payable at a particular time and place, the plaintiff need not aver a demand at the time and place. But it seems, that in the case of a note payable on demand at a certain place, a bank note for instance, a demand would be necessary, and must be averred. *Caldwell v. Cassidy*, 8 *Coven*, 271.

demand of payment be made at such place; and that such a demand is a condition precedent, the performance of which must be averred, and proved by the holder. It is true, that Lord *Ellenborough* and his colleagues in the King's Bench, at first struggled to establish a different rule, but they finally were overcome by the arguments of those who held the opposite opinion; and, yielding to the conviction which those arguments and their own reflections produced, they magnanimously acknowledged their error, and promptly corrected it. I consider that the decision made in this case establishes a new rule, and, I somewhat fear, one that will be found impolitic and injurious; I always feel the utmost reluctance to innovate upon established commercial regulations, particularly those which regard the liability of parties to negotiable paper, even though their wisdom and soundness should be deemed questionable. I think, moreover, that, for very obvious reasons, it would be highly useful and expedient, that the rule in this country and in *England* should be the same on a subject in which both are equally and so deeply interested. The law, with respect to bills of exchange, is founded on principles of universal application, and, in laying down a rule in a particular case, regard should be had to the policy and laws of other countries, as well as our own, and thus guard against the numerous losses and embarrassments in mercantile operations, occasioned by the existence of "*alia lex Romæ, alia Athenis*."

It is not my intention to enter at large into the discussion of the question which is now submitted to our decision, nor to analyze the numerous cases in which it has been considered in the *English* courts; because, very little, if any thing, can be said, which would not be a mere repetition of *what has already been said by others. There is, however, one view of this subject which appears to me has not been sufficiently attended to, and which I wish, as briefly as possible, to bring more distinctly into notice. It is conceded, on all hands, and the proposition is too plain to be denied, that in order to charge the endorser of a note, or bill, made payable at a particular place, a demand at such place is indispensably necessary. It is equally clear, that the necessity of making such a demand is *not* created or imposed upon the holder by the terms of the endorsement, but that it is created by the terms or conditions of the note or bill. This being so, does it not follow, that if the endorser is to be made liable only on condition that a regular demand of payment be made at the place designated in the bill or note, that it is equally necessary to make a similar demand of the maker, or acceptor, in order to charge them? The obligation of both arises out of the same contract, and whatever condition that contract contains, by which the responsibility of the parties is limited or regulated, must necessarily enure as much to the benefit of the maker or acceptor as of the endorser. There is a wide difference between the

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necessity of giving notice to an endorser of the dishonor of negotiable paper, for the purpose of making him answerable, and the performance of some other condition contained in the contract itself. The former is a duty which the law imposes upon the holder, independent of the positive stipulations of the parties, whereas the latter is a condition created by the agreement of the parties themselves. The one is a condition in law, and applicable to the endorser only; the other, a condition in fact, and applicable to all the parties to the paper. To this view of the subject, I have not yet heard any satisfactory answer, and I have a strong conviction that none can be given.

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I will now mention the cases in which this question has been discussed, and, notwithstanding the difference of opinion which once existed, it will be found that, perhaps, no question which has arisen in the *English* courts has finally been decided upon more mature deliberation; and what adds force and authority to the decision of it is, that it was, *in the end, made without a single dissentient. (a) (*Saunderson v. Judge*, 2 *Hen. Bl.*

(a) In *Head v. Sewell*, (1 *Holt's N. P. Rep.* 363.) tried before Gibbs, Ch. J., in November, 1816, the action was by an endorsee against the acceptor of a bill accepted, payable at *Messrs. Harrison's, Picket street, Temple Bar*; and there was no proof or presentment at the latter place; and that was objected, upon the authority of *Gammon v. Schmoll*. (5 *Taunt.* 344.) But Gibbs, Ch. J., said, that "after thirty-five years' experience, in which I have never known this objection to prevail, I cannot admit the necessity of this proof. In an action against the acceptor, where the bill is accepted, 'payable at a particular place,' as in the present case, it is not necessary to prove a demand at *that* place. He is *generally* and *universally* liable upon such acceptance. It has often been so determined. I know there are conflicting cases; but I shall not require the proof."

The reporter, in a note, states, that the two courts were agreed, that where a *particular place* of payment is introduced in the body of the bill, or where a promissory note is made payable at a particular place, in the express terms of the engagement, and not by way of a *mere memorandum* at the foot of the instrument, that, in such case, the bill of exchange and promissory note, (whether the action be against the maker or endorser of the one, or acceptor of the other,) must be presented at *that* particular place, and a demand be made *there*, in order to give the holder a cause of action; and that, as respects a promissory note, the presentment and demand must be alleged in the declaration; but that, since the case of *Gammon v. Schmoll*, they were at variance on the point, whether if a bill, by a *memorandum* at the foot of it, is *accepted payable at a particular place*, the plaintiff is bound to aver and prove a presentment to the acceptor at the place specified, and that, whether the action was against the drawer or acceptor. He adds, that in Trinity term, 1816, the case of *Rouse v. Williams*, which was precisely like that of *Fenton v. Goundry*, came before the K. B., and the court refused to have the point argued, saying, that they considered it as having been determined, in their judgment, in that case; and upon the judgment of the court in this case, a writ of error was brought in the House of Lords, where it was then (1818) pending. It is mentioned that "Mr. Holroyd read a MS. note of the case of *Smith v. Delafontaines*, tried before Lord Mansfield, in 1785, in which his lordship held, that words accompanying an acceptance, "payable at a particular place," or the words "accepted, payable at," &c., were not words restricting or qualifying the acceptor's liability, but rendering him generally and universally liable; and that it was not necessary to prove a demand at the particular place, in an action against such acceptor." Lord Ellenborough added, "that whatever cases might be adduced in favor of, or against the doctrine laid down in *Fenton v. Goundry*, an invincible argument with him for the opinion *there* given was, the constant and undeviating usage of merchants, who never considered such an acceptance to be a restrictive acceptance; that it was a mere

Rep. 509. *Parker v. Gordon*, *7 *East's Rep.* 385. *Lyon v. Sundius & Sheriff*, 1 *Campb. N. P. Rep.* 423, and notes to S.

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matter of convenient arrangement, and did not raise any obligation on the part of the holder, to demand payment at the particular place." It is on the distinction above mentioned, that Lord *Ellenborough* endeavors to reconcile his opinion in *Saunderson v. Bowes*, with that in *Fenton v. Goundry*. But if a holder of a bill, who is not bound to take a qualified acceptance of it, does think proper to receive an acceptance, restricting the payment of the bill to a particular place, is it not, as between him and the acceptor, as much a part of the contract as if it was inserted in the body of the bill itself, or as much as in the case of a promissory note made payable at a particular place? There seems to be no foundation for the distinction; the court of C. B. are more consistent when they put it on the ground, that it is a qualification of the contract, and a condition precedent, the performance of which must be alleged and shown, to entitle the plaintiff to his action. (*Gammon v. Schmoll*, 5 *Taunt.* 353, 354.) The opinion of this court, in *Foden v. Sharp*, was founded on that of Lord *Mansfield*, in *Smith v. Delafontaine*, mentioned by *Bayley* in his *Treatise on Bills*. (78. n. a.) Though the House of Lords should decide in favor of the doctrine laid down by the court of K. B. in *Fenton v. Goundry*, yet the law as decided by this court, in the above case, is in direct opposition to the law as declared by the courts of *Westminster Hall*; for they agree that if the place of payment is inserted in the body of the bill or note, presentment for payment at such place must be averred. There is not, however, a case to be found in the *English* books, prior to that of *Saunderson v. Bowes*, (1811,) which declares, that a demand, in such case, at the particular place mentioned, must be averred and proved, before the plaintiff can sustain his action against the maker of a note. *Chitty*, in his *Treatise on Bills* (2 ed. 1807. p. 323.) says, "If a note be payable at a particular place, it is usual, though not necessary, so to describe the contract. But in an action against an endorser, in which case a presentment is necessary, it seems proper to aver a presentment at the particular place. In an action against the maker of a note, or acceptor of a bill, an allegation of presentment for payment is never stated, though, when the payment is stipulated to be made at a particular place, sometimes an averment of presentment is stated." Again, (page 184,) "where the acceptor undertakes to pay within a certain period after demand, he may insist on the want of presentment; and where he appoints the payment to be made by another person, as at his banker's, he, as well as every endorser, is, *prima facie*, entitled to insist on the want of a proper presentment to such person; but such *prima facie* evidence may be rebutted by proof of the want of effects in the hands of such banker."

Time and *place* are not of the *essence* of the contract, though they may make part of it, by express stipulation. They do not constitute a *condition* on which the existence of the debt is to depend. They relate only to the *mode* in which the contract is to be *executed*. Where a person borrows a sum of money of another, which he promises to pay at a future day, it is *debitum in presenti, solvendum in futuro*. Generally, the time given for the payment is for the benefit of the debtor, and he cannot be compelled to pay it before the time has expired; but he may, if he chooses, pay it sooner, and thereby discharge the debt. So, if he becomes bankrupt or insolvent before the stipulated time of payment arrives, the creditor is entitled to his share or dividend of the bankrupt's estate; for the *debt* is absolute and certain, though the right of action has not accrued. It would be otherwise, if the debt was conditional or contingent.

Where a *particular place* for the payment is specified in the contract, it must be supposed to have been inserted as much for the advantage of the creditor as of the debtor; and if the debtor has a right to insist on paying at the particular place specified, and not elsewhere, the creditor has an equal right, and may refuse to receive payment at any other place; (1 *Roll. Abr.* 446. *Co. Lit.* 212. a.) but if the debtor tenders the money, personally, to the creditor, and pays it into court, can the creditor, also, recover *damages* for a breach of the contract, because the debtor did not pay it, at the particular place stipulated, to the creditor or his agent, who was there ready to receive it? The just inquiry is, has the debtor suffered any loss by reason of the debt being demanded of him at a place different from the one stipulated? If he has, he must show it.

In *Herring v. Sanger*, (3 *Johns. Cas.* 71.) the note was made payable at the *Bank of Albany*, yet the court said that a personal demand of the maker, no objection being made, was sufficient. In *Berkshire Bank v. Jones*, (6 *Mass. Rep.* 524.) the note was payable at the *Berkshire Bank*, and the plaintiffs were

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C. *Ambrose v. Hopwood*, *2 Taunt. 61. *Nichols v. Bowes*, 2 Campb. N. P. Rep. 498. *Callaghan v. Aylett*, 2 Campb. N. P. Rep. 549. and S. C. *3 Taunt. 397. *Fenton and others v. Goundry*, 13 East's Rep. 459. *Saunderson v. Bowes and others*, 14 East's Rep. 50. *Dickinson v. Bowes and others*, 16 East's Rep. 110. *Bowes and others v. Howe*, in the Exchequer Chamber, 5 Taunt. Rep. 30. *Gammon v. Schmoll*, 5 Taunt. 344. S. C. 1 Marshall's Rep. 80. *Butterworth v. Le Despencer*, 3 Maule & Selw. 150. *Benson v. White*, 4 Dow's P. C. 334. *Sebag v. Abitbol*, 4 Maule & Selw. 462.)

WOODWORTH, J., was of the same opinion.

Judgment for the plaintiff.

endorsees. *Parsons*, Ch. J., said, "That a demand of payment need not be made at any other place; and if the holder is at the bank on the prescribed day, ready to receive the money, if the maker be there, it is enough for him. He was not bound to look up the maker, or demand payment of him at any other place. (13 Mass. Rep. 556.) In *Ruggles v. Patten*, (8 Mass. Rep. 480.) an action was brought by the endorsee against the maker of a promissory note, payable four months after date, "at the Penobscot Bank, kept at Buckstown." The defendant, among other pleas, pleaded, that the holder of the note was not ready or present, at the time and place stipulated, to receive payment of the note, and did not demand the same of the defendant, as the plaintiff had alleged. To this plea there was demurrer, and the court held, that it was no bar to an action on a promise to pay money; and that the issue tendered by the plea was, therefore, immaterial.

The judges of the courts in England have laid great stress on the inconvenience that would arise from the doctrine, that it was not necessary to demand payment of the maker of a note, or the acceptor of a bill, at the place at which it was made payable. "Suppose," says *Chambre*, J., "a bill is drawn on you just before you are going out on a circuit, which will fall due while you are absent; what are you to do, but to deposit the money at your banker's, and accept the bill payable there? Otherwise you would be liable to be arrested at any place in the course of your journey, where you might not be provided with money." Such a doctrine "would greatly restrain the circulation of notes and bills of this sort; it would confine them to tradesmen who have a fixed house of trade, and clerks always there, which would greatly impede business and public convenience." But the true question is, what is the contract of the parties? Have they agreed, that unless the creditor goes to the particular place specified to receive his money, he shall have no right of action against his debtor?

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*The matter contained in these pages has been transferred to p 4, ante

END OF THE OCTOBER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN JANUARY TERM, 1820, IN THE FORTY-FOURTH YEAR OF OUR
INDEPENDENCE.

ROGERS *against* TIFT.

IN *May* term last, on the application of a judgment creditor, a feigned issue was directed in this cause, to try the validity of the judgment which had been entered up on a bond and warrant of attorney, in favor of the plaintiff against the defendant. The issue was made up pursuant to the rule entered for that purpose, and was noticed for trial at the last *Rensselaer* circuit; but though called in its order, it was not tried.

Where a feigned issue is awarded by the court, to ascertain the validity of a judgment, entered upon a bond and warrant of attorney, both parties are actors, and a judgment as in case of nonsuit will not be granted for not bringing the issue to trial.

Walbridge, for the plaintiff, on the usual affidavit, now moved for judgment as in case of nonsuit, for not bringing the issue to trial at the circuit.

I. Williams, contra, read an affidavit, stating that the cause had, also, been noticed for trial on the part of the defendant; and that it was not brought on to trial on account of the absence of material witnesses; and he insisted that both parties being actors, a judgment as in case of nonsuit ought not to be granted.

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Per Curiam. This being a feigned issue directed by the court, to ascertain the truth of facts, for its own information, each party is to be deemed an actor; there can, therefore, be no nonsuit for not proceeding to trial.

Motion denied.

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HOGEBROOM
v.
CLARK.

HOGEBROOM and others, executors of VAN SLYCK,
against CLARK.

On a *scire facias* by executors to revive a judgment, where issue is joined on a plea of payment, and the plaintiffs are nonsuited at the trial, they must pay costs.

SCIRE FACIAS to revive a judgment in favor of the testator against the defendant, who pleaded payment, and on the trial of the issue, at the last *Columbia* circuit, when the jury returned to the bar with their verdict, the plaintiffs, being called, did not appear, and were nonsuited.

It appeared that the suit was not brought for the benefit of the plaintiffs or of the testator's estate, but for the assignee of the judgment, which was assigned soon after it was recovered.

E. Williams, for the defendant, now moved that the plaintiffs pay the costs of the nonsuit, or that judgment be entered against them for the same; or for a rule that the assignee pay the costs. He contended, that the 9th section of the act concerning costs, contains no saving or exception in favor of executors and administrators. Its language is general; "that in all suits, upon any writ of *scire facias*, and suits upon prohibition, the plaintiff obtaining judgment or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs," &c. In the case of the administrators *of *Kellogg v. Wilcocks*, (2 *Johns. Rep.* 377.) the court said, that as the 12th section of the act which gives costs against a plaintiff on demurrer, contained no exception in favor of executors and administrators, they must pay costs. The exception in the *second* section of the act cannot be extended to this case. It speaks of suits to be prosecuted, where a plaintiff becomes nonsuited after appearance of the defendant or a verdict against him. It has no reference to proceedings to revive a judgment already obtained.

Again; this suit is not brought for the benefit of the plaintiffs or of the testator's estate. The executors are nominal plaintiffs and trustees for the assignee of the judgment.

Vanderpoel, contra. The 9th section of our statute is an exact transcript from the 8 *Wm. III.* ch. 11. s. 3. except that the *English* statute specifies the nature of the execution to be issued. It is expressly laid down by *Hullock*, in his treatise on *Costs*, (p. 302, 303.) that in *scire facias* by executors or administrators, and a judgment against them after plea pleaded they do not pay costs. (a)

(a) In *Bellew v. Aymer*, 1 *Str.* 188. and *Scammel v. Wilkinson*, 3 *East*, 202., it was decided that executors and administrators were not within the 3d sect of 8 & 9 *Wm. III.* c. 11. which gives costs on *scire facias* and *prohibition*. The exception contained in the 5th section of the *English* act is general. Vide 214

Per Curiam. The *English* courts, in the construction of their statute, have been disposed to narrow its operation, so as not to render executors and administrators liable for costs in many cases; but we have given to our statute a more extended construction. The plaintiffs must pay costs.

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HART
v.
DE LORD

Motion granted.

HART and another *against* DE LORD AND BAILEY. [* 270]

THIS was an action of *assumpsit*. The defendants appeared by the same attorney, gave notice of special bail, and received a copy of the declaration. *De Lord* pleaded *non assumpsit*, and the cause was duly noticed for trial, at the *Rensselaer* circuit. *Bailey* did not plead; and judgment by default was regularly entered against him on the 6th of *November*. At the *Rensselaer* circuit, in *November* last, the plaintiffs, (without any interlocutory judgment against *Bailey*,) pursuant to a notice for that purpose, tried the issue joined on the plea of *De Lord*, and the same jury assessed the damages against him and the other defendant. On the first day of the term, the attorney of the plaintiffs filed the *nisi prius* record, &c., and a rule, *nisi*, for judgment against both defendants; no rule for interlocutory judgment had been entered, and *four* days in term had not expired since the default of *Bailey* had been entered.

Where one of two defendants pleads, and the other makes default, the plaintiff cannot proceed to try the issue joined and have the damages assessed against both defendants, before an interlocutory judgment has been regularly entered against the defendant, who neglects to plead.

Walworth, for the defendant, now moved to set aside the inquest taken at the *Rensselaer* circuit, and all subsequent proceedings. (1 *Caines*, 6. 6 *Johns. Rep.* 325.)

J. Paine, contra.

Per Curiam. The inquest, and all subsequent proceedings, must be set aside as irregular.

Motion granted.

Ketchum v. Ketchum, 4 *Cowen*, 87. *Morse v. M' Coy*, *ibid.* 551. *Ford v. Crane*, 6 *Cowen*, 71. *Prouty Executors v. M' Dougall*, 6 *Cowen*, 612. *Gleason v. Clark*, 1 *Wendell's Rep.* 303.

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BALDWIN

v.

HALE.

Where the plaintiff, being a *feme sole*, after a report of referees in her favor, married, and a judgment was afterwards entered up on the report, and an execution issued, without a *scire facias* being issued, to make the husband a party to the judgment, the execution was set aside for irregularity.

*ESTHER JOHNSON against PARMELY.

THIS cause having been referred, the referees made a report in favor of the plaintiff, in October, 1818. On the 25th of October, after the report was made, the plaintiff intermarried with *William Tibbits*. The plaintiff's attorney proceeded, and entered up judgment on the report, the 4th of December, and issued an execution against the defendant.

Wendell, for the defendant, now moved to set aside the judgment and execution, and all proceedings thereon, for irregularity.

Huntington, contra, cited *Alexander v. Fink*, (12 Johns. Rep 218.) in which the court decided, that the marriage of a *feme sole* plaintiff, after verdict, or after a report of referees, which was the same as a verdict, could not be pleaded in abatement.

Per Curiam. It is a settled principle, that wherever there is a change of parties, by marriage, bankruptcy, or death, whereby other persons become interested in the execution of the judgment, a *scire facias* is necessary so as to make such new person a party to the judgment. (*Tidd's Practice*, 1021.) Here the husband will be benefited by the execution of the judgment, and has, by the marriage, acquired an interest in it. The execution must be set aside for irregularity, with costs.

Rule accordingly.

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*BALDWIN AND WORTHINGTON against HALE.

A replication of *nul tiel record* to a plea of a judgment recovered for the same cause of action, in the Circuit Court of the United States, &c. must conclude to the country, and not with a verification.

THIS was an action of *assumpsit*, on a promissory note. The declaration, beside a count on the note, contained money counts, and a count on an *insimul computassent*. The defendant pleaded *non assumpsit* to the first and second counts, and an account stated, and a note given and received as to the second count; to the third count, a judgment recovered in the Circuit Court of the United States for the second circuit in the District Court of New-York, in an action of *assumpsit*, for not performing the same promise and undertaking in the said third count of the said plaintiffs' declaration stated, averring that the said judgment still remained of record in that court, in full force, and unsatisfied; and that this the defendant was ready to verify by the said record: wherefore he prayed judgment of, &c. The plaintiffs took issue on the first and second pleas, and replied to the third plea, *nul tiel record*, and concluding,

thus they "are ready to verify where and in such manner as the court here shall direct and award: and hereupon a day is given to the said defendant to have the record before the justices of this court, at, &c. on the first *Monday of January next*," &c.

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To this replication there was a special demurrer, assigning for cause, that it should have concluded to the country, and not with a verification.

Johnson, in support of the demurrer, contended, that a judgment recovered in the Circuit Court of the *United States*, was to be considered in the same light as a judgment recovered in another state. In *Collins v. Matthew*, (5 *East's R* p. 473.) which was an action of debt on a judgment in the court of exchequer, in *Ireland*, to which the defendant pleaded *nul tiel record*, with a verification, on a demurrer, the plea was held bad. The court said, that though since the *Union of Great Britain and Ireland*, judgments in the *Irish* courts were pleadable as *records*, yet as they could only be proved by an examined copy on oath, the verity of the evidence could only be tried by a jury, and not by the court. (1 *Chitty's Pl.* 537. 572.)

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The state courts, and those of the *United States*, are independent tribunals; and how is this court to compel a production of the record of the Circuit Court of the *United States*? Where the record is of a superior court, or court of equal jurisdiction, there is no mode of obtaining it, but by a *certiorari* or *mittimus* out of chancery. (*Tidd's Pr.* 691.) But the Court of Chancery has no jurisdiction or authority to send a *certiorari* to the Circuit Court of the *United States*. If the defendant has no legal power to obtain the record of the Circuit Court, he cannot, by the replication, be compelled to produce it before this court. Whether the Circuit Court will give the defendant an exemplification or not, depends on the will and pleasure of that court.

H. Sedgwick, contra. The plea admits that there is a record in the Circuit Court of the *United States*; and it must be presumed that that court will always give an exemplification of it. The original record need not be produced, for the trial in this case is by the *tenor* of the record. (1 *Phillips's Evid.* 289, 290.)

Per Curiam. In the case of *Collins v. Lord Matthews*, (5 *East's Rep.* 473.) it was decided that a plea of *nul tiel record*, pleaded to an action of debt, on an *Irish* judgment, must conclude to the country; for though since the *Union* such judgment is a *record*, yet it is only provable by an examined copy on oath, the verity of which is only triable by a jury. The Circuit Court of the *United States*, in relation to this court, is

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neither a *superior* nor an *inferior* court; but is to be regarded as a court of another government. Their records, therefore, as to this purpose, are foreign records, and the verity of them must be tried by a jury. The original record of that court cannot be brought here to be inspected by this court; nor can the tenor of it be brought in by a *certiorari* or *mittimus* out of chancery. (1 *Chitty's Pl.* 537. 1 *Tidd's Pr.* 691.)

*We are of opinion, therefore, that the objection taken to the conclusion of the replication is well founded, and that the defendant is entitled to judgment on the demurrer: but the plaintiffs have leave to amend.

Judgment for the defendant.

J. & G. KELLOGG against GRIFFIN.

The plaintiff, having a prior judgment, issued a *feri facias* thereon in January, with instructions to the sheriff "to make a levy on the property of the debtor, but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference." The sheriff did nothing, except merely to receive an inventory of the personal property of the debtor, until another execution was delivered to him in May following, at the suit of a subsequent creditor. *Held*, that the first execution was

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dormant, and constructively fraudulent, as against the subsequent execution.

THIS was an action against the sheriff of the county of *Dutchess* for a false return to an execution, and was tried at the *Dutchess* Circuit, in April, 1819, before Mr. Justice Woodworth.

The plaintiffs gave in evidence a judgment against *John Cowles* in the Court of Common Pleas of *Dutchess* County, entered the 10th of September, 1816, for 1,921 dollars and 60 cents debt, and 10 dollars costs, and a *feri facias* issued thereon, delivered to the defendant the 13th of October, 1817, returnable the third Monday of January following, with directions to levy the sum of 960 dollars and 80 cents, with the costs and interest. The defendant returned the execution, which was filed in the clerk's office, the 8th of September, 1818, with an endorsement thereon, "*nulla bona* for residue, in consequence of the avails of real and personal property of the defendant being claimed by *George B. Evertson, Esq.*"

The defendant gave in evidence a judgment against *Cowles* in favor of *G. B. Evertson*, in this court, January 12th, 1818, for 5,278 dollars and 14 cents debt, and costs, and an execution issued thereon, delivered to the defendant the 5th of May, and returnable the 16th of May, 1818.

It appeared in evidence that the plaintiffs' attorney gave instructions to the defendant, at the time he delivered the execution to him, "to make a levy on the property of C.; but to do nothing, until ordered, unless crowded by younger executions, but by no means to let the execution lose its *preference." The sheriff made no actual levy on the property of C., but an inventory of all the personal property which had been made out by the plaintiffs and C., before the plaintiffs' execution issued, was delivered to him, with directions to get a good man to receipt the property. A receipt, by one *Reed*, was endorsed on the inventory. At the time the inventory was

taken, the plaintiffs told C. that if *Evertson* forced the sale of the property, they (the plaintiffs) would bid it in and leave it with C.

On the 6th of *July*, 1818, the defendant sold the personal property of C. for 542 dollars and 42 cents, and the real estate to *Evertson*, for 84 dollars and 5 cents, after deducting the expenses; and on the 20th of *August*, 1818, he executed a deed for the real property to *Evertson*, reciting both judgments and executions. It was admitted, that the plaintiffs were entitled to the proceeds of the real estate, their judgment being the eldest; and the plaintiffs, also, claimed the proceeds of the personal estate, but it was insisted, that the plaintiffs' execution had lost its preference. A verdict was taken for the plaintiffs, for 84 dollars and 5 cents, subject to the opinion of the court on all the evidence, the substance of which is above stated.

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Oakley, (Att. Gen.) for the plaintiffs. A party may purchase property at a sheriff's sale, under an execution, and leave it in the possession of the debtor, without its being fraudulent. (*Watkins v. Birch*, 4 Taunt. 823. *Kidd v. Rawlinson*, 1 Bos. & Pull. 59. 15 Johns. Rep. 430. note.) The judgment of the plaintiffs was *bona fide*. The question, then, is, What delay of the execution will make it *dormant*? The time cannot begin to run, until after the return-day of the execution, for the sheriff is not bound to do any thing before. Can it be said, that suffering the execution to lie from *January* to *May*, there being no other execution, is evidence of fraud? Such a doctrine would be very injurious to debtors, whose property would, often, by an immediate sale, be sacrificed. (*Doty v. Turner*, 8 Johns. Rep. 20.) In the case of *Storm & Beekman v. Woods*, (11 Johns. Rep. 110.) which is the strongest case on the subject, the goods, after a seizure by the sheriff, were left in the debtor's possession for above a year, and by the express direction of the plaintiff to delay the sale. The facts of that case are very different from the present. In regard to the equity of the case, both parties are equal, and the delay of the sale, under the plaintiffs' execution, is not fraudulent.

Again; no actual levy was made on the property of C., except by taking the inventory on the first execution. No sale can be made, unless there has been an actual levy before the return-day of the execution. (2 Caines, 244. 4 Johns. Rep. 456. 13 Johns. Rep. 255.)

J. Tallmadge, contra. The plaintiffs' execution, by the directions given to the sheriff, and the subsequent delay, became dormant. No time has been fixed by the court, within which an execution may be delayed without becoming dormant. The decisions are, that suffering the property to remain in possession of the debtor, after they have been levied upon by the

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sheriff, is, *prima facie*, fraudulent as against subsequent creditors. (2 *Johns. Rep.* 418. 11 *Johns. Rep.* 110. 15 *Johns. Rep.* 428. 430. and note. 7 *Mod.* 37. 2 *Term Rep.* 596. 1 *Lord Raym.* 251. 4 *Dallas*, 358.) If the plaintiff lies by for an unreasonable time, his execution is to be considered as dormant.

But we contend, further, that the plaintiffs' execution has lost its preference, by the improper use which has been made of it to cover the property of the debtor.

Per Curiam. The contest, in this case, is for the proceeds of the *personal* property; for it was conceded, that the plaintiffs were entitled to the avails of the real estate. We are inclined to the opinion, that, according to the decisions of the court which have followed the rule laid down in the *English* courts, the plaintiffs' execution must be considered as dormant, and constructively fraudulent. The evidence warrants the inference, that the plaintiffs issued their execution, not with an absolute intention of collecting their debt, but partly, at least, with a view to cover the property of the debtor, for his use. Having made use of their execution in a manner which the law deems fraudulent *as against other creditors, it was in vain that they told the sheriff, "by no means to let their execution lose its preference." The sheriff has no discretionary power in that respect. The law determines the preference. (*Doty v Turner*, 8 *Johns. Rep.* 20. *Storm v. Woods*, 11 *Johns. Rep.* 118.) The plaintiffs, consequently, are entitled to the proceeds of the real estate only, with interest from the 20th of August, 1818, the date of the sheriff's deed to *Evertson*. (a)

Judgment accordingly.

(a) Vide *Dickenson v. Cook*, post, 332, merely leaving property levied upon, in the possession of the defendant in the execution, though with the plaintiffs' consent, is not, *per se*, fraudulent, either as against subsequent creditors or purchasers; otherwise, where the sheriff is directed to delay the execution or sale. *Kew v. Barber*, 3 *Cowen*, 272. *Russell v. Gibbs*, 5 *Cowen*, 390. *Power v. Van Buren*, 7 *Cowen*, 560.

THE PEOPLE against LAWSON.

A road used as a common highway, since the year 1777, but not recorded as such, is not a public highway within the meaning of the act

relative to highways, (sess. 36. ch. 33. s. 24.) so as to render an obstruction of it a nuisance.

Where the trustees of the village of *Newburgh*, by an ordinance duly made, direct a street or road in that village, which had been used as a highway, to be shut up and discontinued, no appeal lies from the order or decision of the trustees to the judges of the Court of *Common Pleas*; but if such appeal would lie at all, it must be made within forty days after the decision of the trustees.

Court of Oyer and Terminer, held before Mr. Justice *Van Ness*, the 26th of *November*, 1818, when a verdict of guilty was taken by consent, subject to the opinion of the court on all the points of law arising on the case. The jury, however, found, specially, that "the road in question was not used as a public highway on the 21st of *March*, 1777," that fact having been specifically submitted to their decision.

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Many witnesses were examined at the trial, whose evidence was detailed in the case. It appeared that, from about the year 1752, or the close of the revolutionary war, to the 9th of *July*, 1813, the ground on which the house erected by the defendant stands, was used as a common highway, leading to *Gardner's Dock*, in the village of *Newburgh*. On the 9th of *July*, 1813, on the petition of *Edmund Griswold*, part owner of the ground, the trustees of the village passed an ordinance, in due form, ordering that from and after the first day of *November*, then next, the road or highway *in question should be shut up and discontinued, which order was regularly entered on their minutes. The defendant gave in evidence a deed of the premises from the owners of the land to himself, bearing date the 15th of *April*, 1816. On the 20th of *April*, 1816, *George Gardner*, conceiving himself aggrieved by the order of the trustees of the 9th of *July*, 1813, appealed therefrom to three judges of the court of Common Pleas of *Orange* county, and gave notice to the trustees of such appeal.

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On the 25th of *April*, 1816, the three judges met and heard the appeal. The trustees, by their counsel, attended, and objected to the appeal, on the ground that the judges had no jurisdiction, and that the appeal had not been made within the time required by law. The judges, however, proceeded, and made an order, reversing the order of the trustees, and directed the road to be re-opened, which order of reversal was recorded in the office of the town clerk of *Newburgh*, and a copy thereof served on the trustees. In the autumn of the same year, the defendant erected several houses across the road in question.

It was not shown that the road had been originally laid out by public authority; nor did it appear that the order of the trustees, directing the road to be shut up and discontinued, had ever been published, or made known to *Gardner*, by any express notice, before he made the appeal.

P. Ruggles, for the plaintiffs. (a) He cited *Rex v. Lloyd*, 1 *Campb. N. P. Rep.* 260. 10 *Johns. Rep.* 236, 237. *Act*, sess. 40. ch. 43. s. 3. passed 21st of *February*, 1817. *Act*, vesting further powers in the trustees of the village of *Newburgh*, passed *April* 2d, 1813. sess. 36. ch. 116. *Act* to regulate highways, *March* 19th, 1813. 2 *R. L.* 270. sess. 36. ch. 33. s. 36.

(a) The reporter did not hear the argument.

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Oakley, (Attorney-General,) contra. He cited 2 R. L. 277. sess. 36. ch. 33. s. 24. 1 Rev. Stat. 521. § 100.

*PLATT, J., delivered the opinion of the court.

By the 24th section of the "act to regulate highways," (19th of March, 1813. 2 R. L. 277. 1 Rev. Stat. 521. § 100.) it is enacted, that where any roads have been used as public highways, for twenty years next preceding the 21st of March, 1797, the same shall be deemed public highways, although no record thereof has been made.

By the 36th section of the same act it is enacted, that if any person shall conceive himself aggrieved by the determination of "the commissioners of highways," either in laying out, altering, or discontinuing any road, it shall be lawful for such person, "within forty days thereafter," to appeal to any three of the judges of the common pleas, who shall have power to decide on such appeal.

By the "act vesting further powers in the trustees of the village of Newburgh," passed the 2d of April, 1813, the trustees are "appointed commissioners of streets, roads, and highways, within the village of Newburgh;" and they, or any four of them, are vested with "exclusive power" to lay out, streets, &c., in their discretion; and "to shut up, divert, and discontinue" the streets, &c. And "the village of Newburgh shall be considered as a town, for all the purposes intended by this act, and by the 'act entitled an act to regulate highways,' " &c. (See 1st, 2d, and 3d sections.)

Applying all these statutory provisions to the case now before us, I am of opinion, that the road in question cannot be considered as a public highway, because there is no evidence that it has ever been recorded as such; and its use as a public highway is not sufficiently ancient to supersede the necessity of showing such record; for the jury have found that it was not used as a public highway for twenty years next preceding the 21st of March, 1797. If this position be true, it is decisive in favor of the defendant; but if the *locus in quo* was a public highway, then the case shows, (and it is admitted,) that the trustees of Newburgh, who had authority for that purpose, did regularly and formally abolish and discontinue it; and this would lead us to consider the effect of the order of reversal by the judges, on the appeal.

Upon reviewing all the statutory provisions on the subject, *I incline to the opinion, that no appeal lies from the decisions of the trustees of the village to the judges of the common pleas; and that the judges in this case had no jurisdiction.

The act which vests the trustees with the power of laying out and discontinuing streets, &c., no where speaks of any appeal; and I think the words of that act, that the trustees "shall have the exclusive power," were intended to render the corporation of that village independent of the judges, in regard

to the regulation of their streets. The right of appeal cannot be supported by analogy or mere implication: it must be expressly conferred, or it cannot exist. Besides, there are many considerations of policy and expediency against such a controlling power in the judges of the common pleas, as applicable to the streets of such a corporation. If, however, the judges had such appellate power, under the general highway act, that statute is peremptory that the appeal shall be within forty days after the decision of the commissioners; and here the appeal was not till nearly three years after the decision of the trustees.

The counsel for the people urged upon the consideration of this court, the third section of the act of the 21st of *February*, 1817, which enacts, "that when any roads have been used as public highways for twenty years, or more, the same shall be taken and deemed as public highways, although no record thereof has been made," &c. But a reference to dates will furnish a decisive answer. The road in question, if it ever was a public highway, was shut up and discontinued by the trustees on the 9th of *July*, 1813; and the buildings charged as a nuisance, were erected in the *fall* of 1816. Now it would be absurd, as well as unjust, and *ex post facto*, to condemn the defendant for doing an act which was innocent at the time it was done. We cannot allow the subsequent act of the 21st of *February*, 1817, to have such a retrospective operation. If 't was not a public highway when the defendant built his house, he was guilty of no offence; and the subsequent statute has no application to this case.

*We are, accordingly, of opinion, that the defendant is entitled to judgment of acquittal.

Judgment accordingly.

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JACKSON, *ex dem.* J. & G. PEARSON, *against* HOUSEL.

THIS was an action of ejectment, for part of lot No. 81. in the town of *Lansing*, in *Tompkins* county, tried before Mr. Justice *Woodworth*, the 4th of *June*, 1819. A verdict was taken, by consent, for the plaintiff, subject to the opinion of the court, on a case.

John M. Pearson died seised of the premises in question, in *February*, 1809, leaving a widow and two daughters, his only children, the lessors of the plaintiff. *Aurelia P.*, the widow, died in *April*, 1814.

The defendant gave in evidence the last will and testament of *John M. Pearson*, dated the 21st of *July*, 1808, in which he devised as follows: "My property, after my debts are paid,

Where the words of the will were, "My property, after my debts are paid, I leave and bequeath to my beloved wife A., and wish her to educate my two daughters, J. and G., with care, and to treat them with kindness and affection," with out any devise or bequest, ex-

cept a ring to a third person, or other words to explain or control them, they were held to pass the whole real and personal estate of the testator to his wife, in fee.

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I leave and bequeath to my beloved wife, *Aurelia*, and wish her to educate my two daughters, *Joanna M.* and *Gertrude*, with care, and to treat them with kindness and affection. I wish, also, that Mrs. *M.* may be presented with a ring of the value of 40 dollars." The testator appointed his wife, and his brother and father-in-law, his executo.s. *Aurelia*, the widow of the testator, conveyed the premises, in question, on the 10th of *March*, 1810, to *Samuel De Maney*, who, by a deed dated the 3d of *April*, 1817, conveyed the same to the defendant.

The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The question is, whether Mrs. *Pearson* took a fee, or a life estate only. If she took a fee in the premises, then the defendant is entitled to judgment: otherwise not.

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*Judge *Rceve*, in his *Treatise on Domestic Relations*, 487. very justly says, that the governing rule is, that the intention of the testator is to prevail; and such construction is to be given to the words of a will, as to effectuate such estate as comports with the intention of the testator, provided such construction is consistent with the rules of law; and that, in all the cases upon this subject, where the proper technical terms have not been used, the question is, What is the intention of the testator? and if that is discovered to be a legal intention, it is to be complied with.

It is upon this principle that a devise of lands to one, for ever, conveys a fee simple. So, a devise of all one's *estate* in lands conveys a fee, if the devisor had a fee; as it denotes, not only the subject matter of the devise, but the devisor's interest in the subject, unless attended with restrictive words which clearly show the intention of the testator that a fee should not pass. Upon this point the cases are numerous, and the law is perfectly settled.

The case of *Hogan v. Jackson*, (*Cowp. Rep.* 299.) will be found a very strong authority in favor of the defendant. There, after certain specific devises, the testator devised as follows: "I also give and bequeath unto my dearly beloved mother, *Mary Jackson*, all the remainder and residue of all the *effects*, both real and personal, which I shall die possessed of;" and the question was, whether she took a fee in the fee simple estates of the devisor. Lord *Mansfield* said, that the distinction, which was clearly established, was this, if the words of the testator denote only a description of the lands devised, in that case, if no words of limitation are added, the devisee has only an estate for life; but if the words denote the *quantum of interest*, or property, that the testator has in the lands devised, then the whole extent of such his interest passes by the gift to the devisee. The question, he adds, is always a question of construction upon the words and terms used by the testator. Speaking of the devise then under consideration, his lordship

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observed, "The natural and true meaning of *real effects*, in common language and speech, is real property, and *real and personal effects* are synonymous to substance, which includes every thing that can be turned into money;" and *he declared himself clearly of opinion, that the testator meant that his mother should take the *whole of his property*, and that the words were sufficient to effectuate that intention; and the other judges concurred. In *Huxtep v. Brooman*, (1 Br. Ch. Rep. 437.) the devise was, after bequeathing to three persons the overplus of the testator's money, "I give and bequeath to them *all I am worth*, except £20, which I give to my executor;" the lord chancellor held, that the terms, "all I am worth," without other words to control them, must pass real, as well as personal estate. The words and terms of the devise in this case are very clear, and leave not a particle of doubt as to the intention of the devisor. He meant to put all his estate under the dominion and control of his wife, contenting himself with the injunction upon her to educate his daughters with care, and to treat them with kindness and affection. The question turns upon the term, "my property;" whatever that was, he devised it to his wife. The devisor gave her all his property. There is nothing to limit the devise to any species of property, or to any proportion of it; all the testator's property must pass, or none of it. Although the testator expresses a tender regard for his children, he gives them nothing; but, for the purpose of educating and rearing them, he invests every thing in his wife. The words of this devise have received a construction which meets my full assent, in the case of *Morrison and others v. Semple and another*, (6 Binney's Rep. 94.) There, the testator, by a will, very much like the one under consideration, gave to his son-in-law "all his real and personal property." Ch. J. *Tilghman* said, that property signified the right or interest which one has in land or chattels, and that it was used in that sense by the learned and unlearned, by men of all ranks and conditions; and it was adjudged that the devisee took an estate in fee. *Property* is defined to be the highest right a man can have to any thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy. If it be objected, that a devise of one's *property* has not, heretofore, been adjudged to convey all the interest of the *devisor, in any of the *English* cases, I answer, that I am not apprized that there is any decision to the contrary. The terms *all my property* are as extensive and comprehensive as *all my estate*, or *all my effects real and personal*, or *all I am worth*; and when it was first established, that the words *all my estate*, or *all my effects real and personal*, passed a fee simple, these were not technical words to vest a fee; they were rendered operative, because the intention of the devisor was manifest, that a fee should pass. The maxim, *Qui hæret in litera, hæret in cortice*, might be well

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applied to any judge who should refuse to carry into effect the intention of a testator, where that intention is plain; and where he employs words as significant and comprehensive, as those which have been adjudged to carry a fee.

Judgment for the defendant. (a)

(a) In *Doe, ex dem. Wall, v. Langlands*, (14 East, 370.) the words of the will were, "I give and bequeath all and every the residue of my *property, goods, and chattels*, to be divided equally," &c.; it was held, that the word *property* comprehended all that the testator was worth, and would pass his *real* as well as his personal estate; and that the words *goods and chattels*, with which it was joined, were not *explanatory* or restrictive, but *cumulative* merely. (11 East, 290. 518.)

PRESCOTT against HULL.

In an action
of *assumpsit*
against the ma-
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ker of a note,
(not negotiable,) it is a good plea in bar that a judgment was recovered in the Supreme Court of Vermont, (where the note was made and the parties resided,) at the suit of a creditor of the plaintiff, under a *foreign attachment* against the plaintiff, as an absconding debtor, to recover the amount of the same note of and against his credits and effects in the hands of the defendant, the maker of the note, as the trustee and debtor of the plaintiff.

A replication, that before the commencement

of the proceedings on the foreign attachment in Vermont, the plaintiff assigned and transferred the note, &c. to A. is good; the suit here being prosecuted for the benefit of the assignee, who was not before the court in V. nor a party to the proceedings there; it being presumed that the court would have recognized the assignee and protected his rights, had they known of the assignment; and the proceedings there were, therefore, *res inter alios acta*, and it is not drawing them in question to say, that the assignee is not concluded by them; but such replication ought to aver that the debt was assigned for a full and valuable consideration, and that the suit was prosecuting for the benefit of the assignee, otherwise it is bad on demurrer.

The assignment of a *chose in action* need not be by a writing under seal; a delivery of it, for a good and valuable consideration, is sufficient.

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should appear at the court, and it should be made evident by his oath, or other proof, that such trustee had money, goods, chattels, rights, or credits of the principal debtor in his possession, at the time of the service of such process, or at any time since, a record thereof should be made, and the said trustee should be liable to the plaintiff for the money, &c., in his hands or possession, to the value of the judgment recovered against the principal debtor, if so much there be, and that execution should issue therefor: The plea further stated, that on the 11th of *May*, 1816, a suit was commenced, according to the laws of *Vermont*, under the said act, by the *Safford Woollen, Cotton, and Linen Company of Bennington, in Vermont*, against the defendant, at B., he then being trustee and debtor to the plaintiff, by reason of the same premises set forth in his declaration; that the writ was issued in the form prescribed, &c., by which the defendant was required to appear at M., before *the *Bennington* county court, on the first day of *June* then next, to answer to the declaration of the said company, averring that the defendant had in his possession moneys, goods, chattels, rights, or credits of the plaintiff, to the value of 200 dollars; which writ was served and returned in due form, &c.; and that such proceedings were had in such suit, that on the third *Monday of December*, 1816, the said suit was appealed from the said county court to the Supreme Court of *Vermont*, to the *January* term of that court, in 1817; and that the same was duly entered in the supreme court; and at the same court, the plaintiff appeared in and defended the said suit; and denied that he had secretly absconded from the said state, or had kept concealed within the same, at or previous to the commencing of the said suit against him; that the said *Safford* Company appeared in the said Supreme Court of *Vermont*, and averred that the plaintiff, *Prescott*, at the time of suing out and serving of the writ, was an absconding or concealed debtor, &c., and praying that the same might be inquired of by the country, &c. That on this issue joined, a day was given, &c., until the *September* term of that court, in the year last aforesaid, at which time the *Safford* Company and *Prescott* appeared, and a jury was impannelled, &c., who returned their verdict, by which they found that *Prescott* was an absconding debtor; and at which time, also, the defendant appeared, and made answers to interrogatories then and there exhibited to him, &c., whether, at the commencement of the said suit, or since, he had any moneys, goods, chattels, rights, or credits of *Prescott*, the plaintiff, in his hands, and whether he had notice of the transfer of the note mentioned in the first count of the plaintiff's declaration, before the commencement of the said suit of the *Safford* Company, to *Abel & Lord*, or to either of them: The plea further stated, that the said action was further continued before the said court to *January* term, 1818, when all the parties appeared by their attorneys; and that it was

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then and there considered by the said Supreme Court of *Vermont*, that the defendant was a trustee to the said *Prescott*, and then had in his hands credits to the amount of 154 dollars and 98 cents, out of which the defendant should be allowed *his costs taxed at 30 dollars and 45 cents; and that it was further considered by the said court, that *Prescott* was an absconding debtor, and that the said *Safford Company*, plaintiffs in the said action, should have and recover of the said *Prescott*, or of and against his effects in the hands of his said trustee, the sum of 71 dollars and 84 cents damages, and his costs, taxed at 41 dollars and 39 cents, which, together with the costs allowed the defendant, amounted to 143 dollars and 68 cents; and the defendant averred that all and every the causes of action, &c. in the plaintiff's declaration, are the same identical causes, &c., by reason of which he was so considered and adjudged by the said court a trustee to the plaintiff, and to have in his hands credits to the amount of 154 dollars and 98 cents, &c., and were the very point and subject of the controversy, &c., in the said suit, &c.; and as to the 11 dollars and 30 cents, parcel, &c., *nil dicit*, &c.

The plaintiff *replied*, that before the commencement of the said suit by the *Safford Company*, against the defendant, as trustee and debtor of the plaintiff, and before any of the proceedings mentioned in the said plea of the defendant had been instituted, to wit, on the 23d day of *December*, 1815, he, the plaintiff, assigned and transferred the said several contracts, causes, and rights of action, in his said declaration specified and contained, to *Oliver Abel* and *Lynds Lord*, of *Bennington*, in the state of *Vermont*, of which assignment and transfer the defendant, afterwards, and before the commencement of the said suit by the said *Safford Company*, against the defendant, as trustee and debtor of the plaintiff, to wit, on the 23d of *December*, 1815, had due notice, at, &c. And this, &c. wherefore, &c.

To this *replication* there was a *demurrer* and joinder in *demurrer*.

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Mitchell, in support of the *demurrer*, contended, 1. That the plaintiff was estopped by the judgment of the Supreme Court in *Vermont*, from alleging the assignment, or litigating a fact which had been judicially settled by a court of competent jurisdiction in *Vermont*, between two citizens *of that state. The plaintiff and all the parties appeared before that court, and litigated their rights; and that court having adjudged, that the defendant was the trustee and debtor of the plaintiff by reason of the same note, have negatived the existence of the assignment stated in the plaintiff's replication. Where any precise fact has been litigated, and decided by a court of competent jurisdiction, it is *res judicata*, and cannot be again called in question. (*Outram v. Morewood*, 3 *East*, 346. *Taylor v.* 228

Bryden, 8 Johns. Rep. 173. 176. *Hoyt v. Gelston*, 13 Johns. Rep. 141—156. S. C. 3 *Wheaton's Rep.* 246.) The very fact put in issue, tried, and adjudged, in *Vermont*, is now attempted to be again brought in question. The proper mode of taking advantage of this matter of *estoppel*, where it appears in any previous pleading, is by demurrer. (1 *Chitty's Pl.* 575, 576. 1 *Saund.* 326. n. 4 7 *Term Rep.* 537.)

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2. Should it be said that this suit is brought for the benefit of *Abel & Lord*, we answer, that the plaintiff ought to have averred the fact in his replication, so that it might have been put in issue.

The defendant has been legally compelled, by a court of competent jurisdiction, to pay the money; and, having paid it once, he ought not to be compelled to pay it a second time. This principle was laid down in *Phillips v. Hunter*, (2 *Hen. Bl.* 402.) and that decision was recognized by this court in *Embree v. Hanna*, (5 *Johns. Rep.* 101.) and the case of *Fisher v. Lane*, (3 *Wils.* 297.) was disapproved. The parties are, at least, equal in equity, and *melior est conditio defendentis*; but the defendant has higher equity, for, if he is obliged to pay the money a second time, he is without remedy; but the plaintiff would have a remedy.

3. There is no valid assignment. The replication does not aver any *consideration* whatever, nor that it was in writing, or sealed, or delivered, nor that, by the laws of *Vermont*, the debt could be assigned. An assignment, to be good against creditors, must be for an *adequate consideration*, and made *bona fide*. For aught that appears, the assignment was voluntary and fraudulent. (*Winch v. Kelly*, 1 *Term Rep.* 623. *Perkins v. Parker*, 8 *Mass. Rep.* 117, *118.) The replication merely states, that the cause of action was assigned and transferred to *A. & L.*

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Buel, contra. The true question intended to be brought before the court, on this demurrer, is, whether a recovery under a foreign attachment, in another state, can be pleaded in bar to a suit here, in behalf of the assignees of the debt? The demurrer admits the notice, if well pleaded. Are not the assignees of a chose in action, to be protected in a court of law? A foreign attachment is a proceeding *in rem*, transferring a chose in action, by operation of law. (*Kirby's Rep.* 129. 1 *Dallas*, 261. 9 *Mass. Rep.* 408. 13 *Johns. Rep.* 206.) Then, is an assignment by the mere operation of law, to overreach and defeat an assignment in fact? The statutes authorizing foreign attachments apply only to the goods and chattels of the absconding debtor; not to property, debts, or credits, which he had previously assigned. After the assignment of the debt, the absconding debtor had no property in it, which could be attached. (1 *Law of Vermont*, 24.) None of the

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cases, either in *England* or in this country, give any further or greater effect to a foreign attachment.

Again; *estoppels* affect only parties and privies; but *Abel & Lord* were not parties or privies to the suit in *Vermont*. They had no notice of the proceedings there, and ought not to be affected by them. (2 *Madd. Ch.* 156. *Phillips's Ev.* 222. 4 *Bl. Com.* 283.) Unless they were called before the court in *Vermont*, their rights cannot, in any manner, be affected by its decision. Cases may be cited from the courts of all the states in which foreign attachments are allowed, to show that the defence set up by the defendant could not be maintained. Where the debtor of *A.* has made an express promise to pay the debt to *A.*'s factor, the debtor cannot be held, as the trustee of *A.*, under a foreign attachment. (*Staphorst v. Pearce*, 4 *Mass. Rep.* 258.) So the promisor, in a contract not negotiable, but which is assigned in equity, cannot be held as a trustee of the promisee, after the assignment. (*Foster v. Sentiler*, 4 *Mass. Rep.* 450. 5 *Mass. Rep.* 210. 7 *Mass. Rep.* 438. 13 *Mass. Rep.* 218. 3 *Binney's Rep.* 394. 2 *Gallis. Rep.* 557. *Swift's Ev.* 351.)

As to the objection to the form of the replication; an assignment may be by *parol*, or by writing without seal. The words *assigned* and *transferred*, with an averment of *notice*, are all that is necessary; the assignment and notice constitute the substance of the plea; and this court will recognize and protect the rights of an assignee of a chose in action. (3 *Johns. Rep.* 425. 4 *Term Rep.* 690. 16 *Johns. Rep.* 51.)

Mitchell, in reply, said that, for aught that appeared, *choses in action* were not assignable in *Vermont*. The fact should have been averred in the replication. It does not appear that the assignment was, in fact, before the suit was commenced in *Vermont*. Notice of the proceedings to *A. & L.* may be inferred; for the replication avers, that the parties lived in *Vermont*, and the plaintiff litigated the very point there; and the assignees were on the spot. A constructive notice is sufficient. But a notice to *A. & L.* was not necessary to bind them by the proceedings in *Vermont*, (5 *Johns. Rep.* 103.) especially as the suit is not averred to be brought for their benefit.

SPENCER, Ch. J., delivered the opinion of the court. The plea, in this case, would be above all exception, had it averred, that *Abel* and *Lord* had been brought before the court in *Vermont* to contest the point of the assignment to them. The defendant, to be sure, was not bound to aver that fact, because it had not been set up until the replication was put in, that *Abel & Lord* were assignees of the present cause of action, prior to the proceedings against the defendant, as the trustee of the plaintiff. The plea then is good; it appearing that the

court in *Vermont* had jurisdiction of the cause, and that the persons of the parties were before them.

The replication is objected to on several grounds: 1st. That the plaintiff is estopped to draw in question any point decided in *Vermont*, that court having jurisdiction, and all the parties being citizens of, and domiciled in, that state; *2d. Because it is not averred in the replication, that this suit is prosecuted for the benefit of *Abel & Lord*; 3d. Because *Prescott's* appearance in *Vermont* was, in effect, the appearance of *Abel & Lord*; 4th. Because there is no consideration for the assignment, nor is it stated to be under seal.

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The first objection cannot be sustained, if it be considered that a court of law in *Vermont* would recognize and protect the rights of an assignee of a chose in action. On this point, we have no direct proof, but I think it cannot well be doubted, that the courts of that state will notice and protect the equitable rights of an assignee. It is understood, that those courts possess equitable and legal powers, and it would be repugnant to all notions of a well regulated system of jurisprudence, to suppose that courts, possessing both jurisdictions, would refuse its aid to the assignee of a chose in action. If we are to consider this suit as prosecuted for the benefit of *Abel & Lord*, it is not drawing in question any point decided in *Vermont*, to say, they are not concluded by the proceedings set forth in the plea; because, it is *res inter alios acta*. Their rights were never brought into the view of that court, and were never decided upon. The plea does not pretend that they were before that court; and it is not a little remarkable, that although it is stated that an interrogatory was put to the defendant calculated to bring out the fact, whether the defendant had notice of the transfer and assignment of the present cause of action to *Abel & Lord*, before the commencement of the suit by the *Safford Company* against him, the answer is not stated; and if the defendant suppressed the fact, or answered falsely as to the notice, so that the court had no knowledge of the assignment, and therefore took no measures to bring *Abel & Lord* before them, he cannot now make the objection, that it is *res judicata*, for the proceeding would be fraudulent on the part of the defendant. The same answer applies to the plaintiff; if he concealed the fact, which justice required should be made known, he also acted fraudulently; but there is no foundation for saying that the plaintiff represented *Abel & Lord* in the suit in *Vermont*.

*The second and fourth exceptions may be considered together, and I cannot help considering them fatal. It ought to have been averred in the replication, that this debt had been assigned for a full and valuable consideration, and that the suit was now prosecuting for the benefit of the assignees. In *Andrews v. Beecker*, (1 Johns. Cas. 411.) the reporter does not profess to give a full report; in the note, it is stated, that

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nothing but a short note of the case could be obtained. We cannot regard the brief statement of the case as at all evidence of what the pleadings were. In *Littlefield v. Storey*, (3 *Johns. Rep.* 425.) the replication was, that before the commencement of the suit, he sold and assigned over the obligations to *Z. R. Shepherd*, to have and receive the money due thereon to his own use, of which the defendant had notice; averring, that the action was commenced for the sole benefit and use of the assignee, to enable him to collect and receive the moneys due. It does not appear, that any objection was made to the form of the replication; but there is an evident distinction between the cases. Here, the *Safford Company* had an interest in this debt, unless it had been assigned *bona fide*, and for a full consideration. In the case of *Winch v. Keeley*, (1 *Term Rep.* 619.) the consideration for the assignment is not fully stated; but there is the same averment as in the last case, that the suit was for the sole benefit of the assignee. And in *Perkins v. Parker*, (1 *Mass. Rep.* 117.) which is a case very analogous to the present, where the assignment of the chose in action was alleged to be for value received, all the judges held, that the replication was defective in not stating that the assignment was made upon a good and adequate consideration, setting forth the nature and amount; and some of the judges held, that it ought to be under seal.

I do not consider the want of a seal essential; the mere delivery of the *chose in action* upon a good and valid consideration, would be sufficient, even were it a specialty. It ought, however, to be alleged, that the assignment was for a full and valuable consideration, and that it is a subsisting assignment, by an averment, that the suit is prosecuted for the benefit of the assignee.

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*The defendant must have judgment, with leave to the plaintiff to amend, on payment of costs.

Judgment for defendant.

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THIS was an action of covenant. By an agreement under the hands and seals of the parties, dated *September 20, 1817*, the plaintiff covenanted to sell and convey to the defendant, by a good and sufficient warrantee deed, &c., a certain lot of land; in consideration of which the defendant covenanted to pay to the plaintiff 1,600 dollars, as follows: 400 dollars to be paid down in money; 150 dollars in obligations, at the same time, and on the execution and delivery of the deed; and the residue to *Jacob Smith*, who held a mortgage against the premises. The breach alleged was the non-payment of the sum of 150 dollars, in obligations. At the trial, before Mr. Justice *Yates*, at the *Herkimer* circuit, in *June, 1819*, the plaintiff proved that the deed had been duly executed and delivered to the defendant; and it was admitted, that the defendant had paid down the 400 dollars in money; and the only question was as to the payment of the 150 dollars in obligations. It was proved on the part of the defendant, that the parties met together, in *September, 1817*, and after the deed was executed, the defendant counted and laid down the 400 dollars, and also two promissory notes, one executed by *Amos Root*, the 6th of *May, 1817*, for 100 dollars payable to *G. & W. Kretsinger* or bearer, six months after date; the other for 59 dollars and 38 cents, and made by *John Vrooman, Junior*, payable to *G. & W. Kretsinger* or bearer, and then due; and the plaintiff was to give the defendant *a note for the excess of 9 dollars and 38 cents: Some dispute having arisen between the parties, the plaintiff took up the money and notes which had been tendered by the defendant and laid on the table, and kept them, and refused to return them; and he threw on the table the deed, and his note for 9 dollars and 38 cents, which the defendant then refused to accept: But the defendant finally took the deed and note, the plaintiff refusing to return the money and the notes taken up by him. The plaintiff's counsel objected to giving evidence of the receipt of the notes by the plaintiff, without a notice to produce them, which objection was overruled by the judge.

The plaintiff gave evidence to show that *Root's* note was not good, but that he was insolvent; and that the defendant was to endorse the notes, and the plaintiff to make oath that the premises were unincumbered, except as to the mortgage mentioned.

The plaintiff's counsel insisted, that by the terms and legal

Where A. covenanted to convey to B., by a good warrantee deed, a lot of land, and B. covenanted to pay A. 400 dollars in money and 150 dollars in obligations, on the execution and delivery of the deed, these are dependent covenants, and to be performed simultaneously; and B. having tendered 400 dollars in money, and two promissory notes executed by third persons payable to him or bearer, and not endorsed by him, amounting to 150 dollars; which A. took up and kept, throwing down, at the same time, a deed to B.,

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which he refused to accept, but which he afterwards received. *Held*, that this was a performance of the covenant on the part of B. for the payment of 150 dollars in obligations; and that the notes were taken by A. on the original contract as a payment, and at his own risk as to the insolvency of the makers; there being no fraudulent representations or concealment on the part of B.,

though, if there had been any fraud, in this respect, the plaintiff could not have availed himself of it, in an action of covenant for the non-delivery of the obligations.

Where the form of action, or pleadings, gives the party notice to be prepared to produce a writing or instrument, if necessary, no other notice to produce it is requisite.

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construction of the agreement, the notes were not, under the circumstances, a payment or discharge of the sum of 150 dollars so agreed to be paid in obligations; but the judge charged the jury that the notes were, in judgment of law, a payment of that sum, and the jury, under his direction, found a verdict for the defendant.

The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The plaintiff moves for a new trial, on two grounds: 1st. That parol evidence to prove the notes received by the plaintiff, or their contents, was inadmissible, no notice having been given to produce them.

2d. That the covenant to pay 150 dollars in obligations, at the time and on the executing and delivery of the deed, was not satisfied, by the delivery of notes producing no avails.

As to the first point, the case does not state the nature of the pleadings, and we ought to intend that the defendant either pleaded or gave notice that he would give in evidence, that he had delivered to the plaintiff, pursuant to the covenant, at the time of the execution and delivery of the deed, *obligations amounting to one hundred and fifty dollars, which were then and there accepted. This we ought the more strongly to presume, because it is not made an exception that the pleadings would not have authorized the admission of the proof. If so, then the principle of the case of the *People v. Holbrook* applies. (13 *Johns. Rep.* 92.) After reviewing all the cases, we held that in an action of trover for bonds or notes, no notice to produce the thing sought to be recovered was necessary; and that where the form of action gives the party notice to be prepared to produce the instrument, if necessary to falsify the evidence of the other party, it is not necessary to give notice to produce the instrument.

These principles apply directly to this case: The form of the pleading, we must presume, gave the plaintiff notice, that he had received, and had in his possession, obligations amounting to more than 150 dollars; he was bound, then, if he would falsify the allegation, to have come prepared to produce them.

The payment of 400 dollars in money, and 150 dollars in obligations, and the execution and delivery of the deed, were dependent acts, and to be performed simultaneously. In *Whitbeck v. Van Ness*, (11 *Johns. Rep.* 411.) all the cases in which the delivery and acceptance of a bill or note would or would not be a payment, were examined and reviewed, and the result was, that taking a bill or note, for goods sold at the time, was a payment, because it was part of the original contract, but that for a precedent debt, the acceptance of a bill which turned out to be bad, was no payment. Among other cases, we referred to that of the *Bank of England v. Newman*.

(1 Lord *Raymond*, 442.) in which Lord *Holt* ruled, that if a man has a bill, payable to him or bearer, and he delivers it over; for money received, without endorsement, this was a plain sale of the bill, and he who sells it does not become a new security. In the present case, the notes were not delivered in satisfaction of a precedent debt; they were delivered on the original contract, and the defendant did not endorse them, nor was he required to do so: They were taken then at the peril and risk of the plaintiff, as regarded *the solvency of the drawers, unless, indeed, there were fraudulent representations, or a fraudulent concealment of facts. No such representations or concealment, however, were pretended, and had they existed, the plaintiff could not have availed himself of such facts in this case, which is an action of covenant for the non-delivery of the obligations. The mere question was, whether obligations to the amount stipulated had been delivered. The nature of the issue shut out all inquiry as to the solvency of the drawers of the notes, or fraud in passing them.

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Motion for a new trial denied. (a)

(a) Vide *Robb v. Montgomery*, 20 Johns. Rep. 15. *Parker v. Parmela*, Ibid. 130. *Hudson v. Swift*, Ibid. 24. *Canfield v. Wescott*, 5 Cowen, 270, 271. Note a. *Tompkins v. Elliott*, 5 Wendall's Rep. 496.

HELM against MILLER.

THIS was an action of assumpsit, tried at the *Steuben* circuit, the 10th of *June*, 1819, before Mr. Justice *Woodworth*. The plaintiff gave in evidence a note executed by the defendant, as follows: "For value received, four years after the date hereof, I promise to pay to *William Helm*, or order, three hundred and fifty dollars, with interest until paid. This note is executed in consideration of a negro man, named *John*, this day delivered by said *Helm* to said *Miller*; and it is the express understanding of the parties, that if, in consequence of any law of this or of the *United States*, the said negro man shall be legally discharged or liberated from the possession of the said *Miller*, previous to the payment hereof, then this obligation to be void. This provision is not, however, to extend to any laws to be passed hereafter for the emancipation of slaves; dated *October 21*, 1813."

It was proved that the defendant purchased the negro man of the plaintiff; and at the time of sale, it was agreed, *on the

The plaintiff, who had married an executrix, who was also legatee of all the testator's property, including slaves brought with him into this state from *Virginia*, sold a slave belonging to the testator, at the time of his decease, and took a note for the consideration money, which he applied to the payment of his own debt.

Held, that

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the sale was made, not in

the character of executor, in right of his wife, but in his private right, as part of his property acquired by his marriage with the legatee, and was, therefore, illegal and void, especially as the sale was not necessary to pay the debts of the testator, and there was evidence of a contrivance to elude the act; (2 N. R. L. 201 1 Rev. Stat. 656.) and that no action could be maintained on the note given for the consideration money

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suggestion of the plaintiff, and for greater caution, that the plaintiff should confess a judgment in favor of the defendant; and that an execution should issue by virtue of which the negro should be sold; which was accordingly done, and a bill of sale was executed by the sheriff to the defendant, which was produced and proved at the trial.

It was admitted that the negro man was brought from the state of *Virginia* by *P. Thornton*, who owned him, at the time of his death, in 1806; and by his will, dated *July 1, 1806*, which was produced, he devised to his wife all the property he possessed in the state of *New-York*, including his negro slaves, and appointed his wife executrix, and *L. Washington* of *George* county, *Virginia*, his executor. The will was proved, and letters of administration thereon granted to *Susan Thornton*, widow of the testator, only, as executrix. Previous to the giving of the above mentioned note the plaintiff married the said *Susan Thornton*. It appeared that the plaintiff had assigned the note to *Nathaniel Wells & Co.* of *New-York*. It was proved that the defendant had admitted that the note was justly due to the plaintiff. The judge ruled that the action was not sustainable, and nonsuited the plaintiff.

A motion was made to set aside the nonsuit, and for a new trial.

T. Sedgwick, for the plaintiff. This was not such an importation and sale of the slave, as would render the transaction void under the act. (2 *N. R. L.* 201. sess. 36. ch. 88. 1 *Rev. Stat.* 656.) In the case of *Sable v. Hitchcock*, (2 *Johns. Cases*, 79.) the court were of opinion that the objects of the act are answered by restraining its operation to the traffic in slaves, by persons acting in their own right, and for their own emolument; and that a sale, in the course of administration, or by persons acting in *auter droit*, as executors or administrators, or trustees, was not within the act. The plaintiff, then, in place of his wife, who was executrix, might sell the slave. Such a case not being within the mischief of the act, is not to be deemed as within its intent.

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The plaintiff having married the executrix, who had a right to sell the property of the testator, it is the same as *if the sale had been by the executrix. He might elect to hold as executor or legatee. (*Shep. Touch.* 438. 10 *Co.* 47. 3 *Bac Abr.* 84. 2 *Eq. Cas. Abr.* 458. 2 *P. Wms.* 532.) If it is for the interest of the plaintiff to hold as executor, or, *vice versa*, as legatee, the law will presume that he holds in that character which is most for his interest. (*Cro. Eliz.* 223.)

It is true, that the court, in the case of *Cesar v. Peabody*, (11 *Johns. Rep.* 68.) held, that though a person might lawfully purchase a slave, regularly sold by the sheriff under a judgment and execution against the owner, yet that such purchaser

could not himself sell the slave ; but this decision is hardly reconcilable with that of *Sable v. Hitchcock*.

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Collier, contra. The statute prohibits the importer of a slave from selling. Now, a legatee can have no other or greater rights than his testator. The donee, by a gift, can acquire no more than the rights of the donor. The case of *Cæsar v Peabody*, in which it was decided that a sale by a purchaser of a slave under an execution was void, is much stronger than the present.

It is said that the plaintiff's wife must be considered as taking in the character of executrix, and that in that capacity she might sell. The assent of an executor to take as legatee, is express or implied ; and it is to be implied from his language or conduct. (1 *Comyn's Dig. Adminis.* ch. 5. *Toller's Law of Ex.* 345. *Roper on Legacies*, 192. 1 *Lev.* 25. 1 *Roll. Abr.* 619. 1 *Leon*, 216. *Shep. Touch.* 454.)

If the plaintiff acted in his own right, he cannot claim to have acted as executor, or in the right of another. Now, he made the sale and took the note in his own name, and applied the money to his own individual debt.

Again ; the sale under the judgment and execution was collusive, and in fraud of the statute. (2 *Johns. Ch. Rep.* 172. *Cro. Eliz.* 347, 348. 3 *East*, 120.)

Sedgwick, in reply, said, that the court would presume that the plaintiff elected to sell in that capacity in which he might lawfully sell ; not that he elected to do an unlawful act.

*SPENCER, Ch. J., delivered the opinion of the court.

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If the sale of the negro man by the plaintiff was not in his representative character, as executor in the right of his wife, *Susan Thornton*, but in his private capacity, then the nonsuit is right ; for it would have been in violation of the statute ; the slave would become free, and consequently there would be a total failure of the consideration of the note. The case of *Sable v. Hitchcock*, (2 *Johns. Cas.* 79.) decided, that the sale of a slave imported into this state since the passing of the act of the 22d of *February*, 1788, in the course of administration, or by persons acting in *auter droit*, would not be within the act, so as to subject the vendors to the penalty, or to emancipate the slave, if the sale was free from collusion.

In the present case, the facts show that the sale was not made by the plaintiff as executor of *Thornton*. Mrs. *Thornton*, with whom the plaintiff intermarried, was the legatee of all her former husband's personal estate, and she was also executrix. *Thornton* died in 1806, and the negro in question was sold by the plaintiff in 1813 ; and it does not appear that *Thornton* owed any debts. Now, as Mrs. T. was legatee and executrix, it was competent to her to take as legatee. If the

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legatee be executor, and says he will take according to the will, that amounts to an assent to take as legatee. (*Com. Dig. Administration*, (C. 6) 354. 1 *Lev.* 25. 3 *East*, 120. *Roper*, 192.) So far does the sale of the slave appear to have been unnecessary in the administration of *Thornton's* estate, that the note in question was disposed of to pay the plaintiff's private debt; add to this the device adopted to elude the provisions of the statute, by the plaintiff's confessing a sham judgment under which the slave was sold. The lapse of time, too, since *Thornton's* death, precludes the idea that it was necessary to sell the slave to pay his debts. The acts of the plaintiff are decisive, that he did not sell the slave as executor, but in his private right, and as part of his property acquired by his intermarriage with Mrs. *Thornton*. The motion to set aside the nonsuit must be denied.

Motion denied.

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*JACKSON, *ex dem.* BENNET, *against* LAMSON.

Where a mortgage contains a power of sale, on default of payment of any part of the money secured to be paid, and the mortgagee proceeds under this power, and gives public notice of the sale of the mortgaged premises, for six successive months, pursuant to the statute, this, in an action of ejectment against the mortgagor, will be deemed equivalent to six months' notice to quit, previous to the commencement of the suit.

THIS was an ejectment brought to recover certain lots of land, in *Argyle*, in *Washington* county. The defendant, on the 3d of *August*, 1815, executed a mortgage of the premises to the lessor of the plaintiff, for securing the payment of 1,500 dollars, according to the condition of a certain bond, &c. It was provided and agreed in the mortgage, that in case of non-payment of the principal or of the interest, or any part thereof, at the times limited for the payment, in the condition of the bond, that the mortgagee should have power to sell and convey the premises, at public auction, and execute a conveyance therefor, to the purchaser at such sale, &c. It was proved that the premises were duly advertised for sale, by virtue of the power so contained in the mortgage, for six successive months, pursuant to the statute; and the premises were sold, according to the notice, on the 9th of *February*, 1818, and the lessor executed a deed of the premises to the purchaser at such sale, who, afterwards, on the 11th of *February*, 1818, released and quit-claimed the same premises to the lessor of the plaintiff.

It appeared from the condition of the bond produced at the trial, that the 1,500 dollars was to be paid in instalments as follows: 400 dollars on the 1st of *February*, 1816; 400 dollars on the 1st of *February*, 1817; 400 dollars on the 1st of *February*, 1818; and the further sum of 300 dollars on the 1st of *February*, 1819. And it was objected, on the part of the defendant, that the whole sum of 1,500 dollars not being due at the time of the sale, the proceedings under the power for a sale and foreclosure, were illegal and void; but the ob-

jection was overruled by the judge. It was then objected, that the plaintiff was not entitled to recover, as no notice to quit had been given to the defendant. A verdict was taken for the plaintiff, subject to the opinion of the court, on the question, whether the defendant was entitled to a notice to quit before the commencement of the suit.

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**Weston*, for the plaintiff.

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D. Shepherd, for the defendant.

Per Curiam. We are of opinion that the notice of the sale of the premises, under the power contained in the mortgage, was equivalent to six months' notice to quit. It fully apprized the mortgagor, that if he suffered the premises to be sold, that the implied tenancy under the mortgage would be at an end.

Judgment for the plaintiff.

SCHOONMAKER *against* ROOSA and DE WITT.

IN ERROR to the Court of Common Pleas of *Ulster* county. The plaintiff in error brought an action of assumpsit, in the court below, against the defendants in error, on a promissory note, dated the 10th of *June*, 1813, by which the defendants promised to pay to the plaintiff, or order, on demand, 1,500 dollars, for value received. The defendants pleaded the general issue, and gave notice that, on the trial of the cause, they would give in evidence that on the 10th of *June*, 1813, the plaintiff and defendants entered into an agreement, by which they appointed *Lucas Elmendorf* sole arbitrator to settle and adjust all differences and demands existing between the plaintiff, and *A. Roosa*, defendant, as assignee of *Frederick S. Elmendorf*, and also, of all differences and demands between the plaintiff, and the defendants, as executors of the last will and testament of *Levi De Witt*, deceased; and for that purpose notes were executed by the parties, to each other, to bind them to the submission, *&c., and that the note mentioned in the plaintiff's declaration was executed for that purpose, and no other, and put into the hands of the arbitrator, for him to endorse thereon, in his capacity of arbitrator, the amount due from the estate of *Levi De Witt*; and that it was expressly agreed that the de-

Where the plaintiff, and the defendants, (who were executors,) agreed to submit a difference between them, as to the accounts between the plaintiff and the testator, to the award of E., and executed promissory notes to each other, signed as individuals, for the sum of fifteen hundred dollars, each payable on demand, and which were de-

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livered to the arbitrator, who was to endorse his award, and the arbitrator endorsed, on the note given by the defendants,

his award, finding a balance due to the plaintiff from the estate of the testator, of 97 dollars and 38 cents, and also endorsed a payment, so as to reduce the note to that sum, and endorsed the other note as fully paid and satisfied: In an action brought against the defendants on the note given by them, to recover the sum so awarded by the arbitrator, it was held, that the defendants were not liable *personally*; and that the plaintiff could not maintain his action, without proving *assets* in the hands of the defendants.

The consideration of a promissory note, as between the immediate parties, may be inquired into, and if given without consideration, it is *nudum pactum ex quo non oritur actio*.

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fendants should not be otherwise accountable on the note than as executors, and not in their individual capacity, &c.

The plaintiff proved the promissory note stated in the declaration, which was produced, and on which the arbitrator had made the following endorsement: "In pursuance of the decision made on the respective demands between the executors of the last will and testament of *Levi De Witt* and *William Schoonmaker*, there is due from the estate of the said *Levi De Witt*, deceased, 97 dollars and 38 cents; I do, therefore, in pursuance of the authority vested in me by the parties, endorse a payment on the within note of 1,402 dollars and 62 cents, on the day of the date of the within note." The plaintiff claimed to recover the balance of 97 dollars and 38 cents, so found by the arbitrator.

The defendants proved that they were the executors of *Levi De Witt*, and that there was a controversy between him and the plaintiff as to their accounts, which was submitted to the decision of *L. E.*, an arbitrator, as stated in the notice, and the promissory notes given by the parties, on one of which, produced by the defendants, the arbitrator had endorsed the balance found in favor of the plaintiff, and that he, therefore, declared that note fully satisfied. That it was verbally explained and agreed between the parties, at the time of submission, that the defendants, for any thing that should be awarded against them, were only to be liable in their capacity as executors, and in the course of administration, and not in their individual capacities; and that the award was made and the notes endorsed and delivered by the arbitrator in pursuance of the submission. The evidence on the part of the defendants was objected to as incompetent; but the court decided that it was admissible, and that the action was not maintainable, and directed a nonsuit. The plaintiff tendered a bill of exceptions to the opinion of the court, on which the writ of error was brought.

[* 303] * *C. Ruggles*, for the plaintiff in error. The defendants gave the note in their individual capacities, and could not have been sued upon it, in their representative character. Besides, if executors or administrators submit a matter relative to the estate of the testator or intestate, to arbitration, are they not liable in their individual capacity?

Again; parol evidence was inadmissible to show how the note was intended to be made, or any terms or conditions varying the written contract. (*Thomson v. Ketcham*, 3 *Johns. Rep.* 189. *Hoare v. Graham*, 3 *Campb. N. P.* 57.) The rule as to admitting parol evidence to vary or contradict written instruments, applies as well to writings not under seal as to deeds. (1 *Taunt.* 115. 1 *Johns. Rep.* 433. 2 *Johns. Rep.* 346. 9 *Johns. Rep.* 38.)

As to any objection of a want of consideration, it may be questioned whether that can be alleged against a promissory

note. (*Livingston v. Hastie*, 2 Caines, 246. per *Livingston*, J.) But here was a sufficient consideration, the submission of the matters in difference between the plaintiff and defendants, and their undertaking to pay.

Again; the defendants cannot plead *plene administravit*. In *Barry v. Rush*, (1 Term Rep. 691.) where the defendant executed a bond, as *administrator*, to abide by an award to be made concerning matters in dispute between his intestate and another, it was held, that entering into the bond was an admission of assets, and that he could not, afterwards, dispute it.

But on a plea of *plene administravit*, the *onus probandi* lies on the defendant, and it was for the defendants to show a want of assets, if they could be allowed to do so. (*Platt v. Robins and another*, 1 Johns. Cases, 276.)

Foot, contra. There is no doubt about the rule of law, as to the admission of parol evidence to vary written contracts; but this case forms a manifest exception to that rule. The giving the notes and the submission were simultaneous, and the endorsements made by the arbitrator, show the purpose for which they were given. The notes were made and delivered to the arbitrator at the *time of submission, and were to be delivered by him to the parties according to his award. Until the arbitrator made his award, and delivered the note to the plaintiff in pursuance of it, the note could have no legal operation, and his endorsement must be taken with the note, as one and the same transaction.

The defendants were not called upon to show a want of assets, as the court decided that the action could not be maintained at all, and, therefore, nonsuited the plaintiff.

A note given by an administrator, as such, for value received by the intestate, is void for want of consideration. (*Ten Eyck v. Vanderpool*, 8 Johns. Rep. 120.) And, as between the original parties to a note, the consideration may be inquired into.

Ruggles, in reply. The case of *Ten Eyck v. Vanderpool*, is distinguishable from the present. The note here is for value received, without saying from whom; and the presumption is, that it was received by the maker.

Per Curiam. The consideration of a promissory note, as between the original parties themselves, may be inquired into; and if there is no consideration for the promise, it is *nudum pactum*, and cannot be enforced at law. (*Pearson v. Pearson*, 7 Johns. Rep. 26. *Ten Eyck v. Vanderpool*, 8 Johns. Rep. 120. *Rann v. Hughes*, 7 Term Rep. 350. note. S. C. 4 Bro. P. C. 27. 2d ed. by Tomlins.) In the case of *Rann v. Hughes*, Baron Skynner, who delivered the very able and lucid opinion in the House of Lords, says, "It is undoubtedly true, that

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every man is, by the law of nature, bound to fulfil his engagements. It is equally true, that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and that whatever be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is understood in our law."—"If I promise, generally, to pay upon request, what I was liable to pay on request in another right, I derive no advantage or convenience from this promise, and, therefore, *there is no sufficient consideration for it." He observed, that all contracts, by the law of *England*, were distinguished into agreements by *specialty* and *parol*; that there was no third class, as contracts in *writing*. "If they be merely written, and not *specialties*, they are *parol*, and a consideration must be proved." He added, that the doctrine delivered in *Pillans v. Mierop*, (3 Burr. 1663.) as to a *nudum pactum*, was erroneous; and that Mr. J. *Wilmot* not only contradicted himself, but was contradicted by *Vinnius*, in his comment on *Justinian*. But that, whatever was the rule of the civil law, there was no such law in *England*.

The defendants in this case were executors, and the note they gave was a mode adopted, by the mutual agreement of the parties, to submit their difference with the plaintiff, as to the matters of account between him and their testator, to arbitration. In *Pearson v. Henry*, (5 Term Rep. 6.) it was decided, that a submission to an award, by an administrator, was not an admission of assets; and the case of *Barry v. Rush* was held to be clearly distinguishable; as in that case, the defendant gave a bond, by which he bound himself, his heirs, executors, and administrators, in broad terms, to pay whatever should be awarded, without any regard to assets. (a) (*Kyd on Awards*, 40.) And if there are no *assets*, a personal promise by the administrator would be a *nudum pactum*. The award endorsed by the arbitrator shows, that it was intended merely that he should ascertain what was due from the estate of the intestate, and that the defendants should be liable only in their representative capacity, or so far only as they had assets. It was incumbent, then, on the plaintiff, to show, affirmatively, that the defendants had assets; for a promise by an executor to pay is not binding, unless he has assets.

We are of opinion, that the judgment of the court below ought to be affirmed.

Judgment affirmed.

(a) Vide *Worthington v. Barlow*, 7 Term Rep. 453.

***MERRITT AND OTHERS *against* BRINKERHOFF AND VAN WAGENEN.**

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THIS was an action on the case, tried at the *Rensselaer* circuit, before Mr. Justice *Van Ness*, in 1818.

The declaration contained four counts: The first count stated, that the plaintiffs were possessed of certain mills and works used for the purpose of manufacturing flour, and had a right to the benefit and enjoyment of the water of a certain stream of water, in *Troy*, &c., which had run and flowed, &c. until the stopping of the same, &c., and which of right ought still to run and flow to the said mills; for supplying them with water, &c. Yet the defendants, well knowing, &c., and intending to injure the plaintiffs, and to hinder them from working their said mills, &c., and to injure them in their trade and business of manufacturing flour, &c., on the 1st of *July*, 1816, and on divers times between that time and the day of the exhibiting the bill of the plaintiffs, &c., wrongfully made and erected a dam of thirty feet height across the said stream above the said mills, and kept the said dam so erected, and thereby hindered and prevented the water of the said stream from running along its usual course to the mills of the plaintiffs, and supplying the same with water, by reason whereof sufficient water to turn the mills of the plaintiffs during all that time, could not, and did not, run to the said mills; and the plaintiffs could not, for want of water, use their said mills, or either of them, or use or follow their said trade or business, in so large or beneficial a manner as they might otherwise have done. The second count was like the first, except that it alleged the stopping of the water, &c. on the 1st of *January*, 1815, and since. The third count was, also, like the first, except that it charged that the defendants, on the 1st of *July*, 1816, raised a dam 28 feet beyond its usual height, above the mills of the plaintiffs, and above the canal, possessed by the plaintiffs, for conducting the water of the said stream to the said mills, and thereby stopped a much greater quantity of water of the said stream, than had been used to *be stopped, or ought to have been stopped, and prevented its flowing to the said canal, and through that to the plaintiffs' mills. The fourth count was similar to the third, except that it charged the raising the dam by the defendants, on the 1st of *January*, 1815, 28 feet beyond its usual height, &c.

The plaintiffs gave in evidence a deed from *David Defreest* to *Thomas L. Whitbeck*, his heirs and assigns, dated 15th of *May*, 1795, for the consideration of five shillings, and the yearly rent and covenants therein contained, on the part of the grantee, for a certain piece of land situate in *Troy*, therein described, containing about two acres, including the mills of the plaintiffs: together with the privilege and liberty, at all

Where several owners of mill-seats on a stream, have a common and equal right to the use of the water, though no action lies against the owner of a mill above, for any damage which the owner of a mill below may incidentally suffer from the reasonable use of the water by the former, for his own benefit; yet the owner of the mill above has not an unlimited right to use the water as he pleases, or to stop the natural flow of the stream, so as to destroy or render useless the mills below. And if he shuts down his gate, and detains the water for an unreasonable time, or lets it out in such unusual quantities as to prevent the owner of the mill below from using it, or deprives him of a reasonable and fair partici-

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pation in the benefits of the stream, he will be answerable to the party injured to the extent of the loss he has thereby sus-
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times thereafter, of digging a raceway, at least twelve feet wide, through the land of the said *D. Defreest*, beginning between the third and fourth hemlock trees, standing below the bridge then erected over *Mathias Kill*, and running from thence through the land of the said *Defreest*, keeping a proper distance from the burying ground, until it intersected the described premises; and also the liberty and privilege of damming the water in the said *Mathias Kill*, and erecting a dam to raise the water three feet and six inches higher than the dam then was, together with the privilege of drawing the water out of the said kill, through the said canal or raceway so to be dug, and also the use and privilege of the water in the *Binne-gat*, together with the soil under the water: yielding and paying therefor, &c.

The plaintiffs then deduced a title from the said *Whitbeck*, deceased, to themselves, in the above described premises.

The defendants held the premises occupied by them under two leases from *David Defreest*, above mentioned, to *John Brinkerhoff*; one dated *April 15, 1807*, for the term of 16 years; and the other, dated *May 1st, 1809*, for the term of 40 years, at the annual rent of 450 dollars, with a restriction, in the first lease, against building a grist mill; and in the last, against building a gunpowder mill on the premises. The leases comprised about six acres of land; and the *Wynant's*, or *Mathias Kill*, (on a part of which the defendants' mill and dams are erected, which are the *ground of this suit,) and the premises are thereby demised, together with all and singular the trees, &c., waters, water courses, benefits, liberties, and privileges to the premises belonging or appertaining. A map, showing the situation of the stream and mills, and canal leading to the defendants' mills, was produced. It appeared that the water was carried by a canal to two penstocks, and thence conducted to the overshot wheels of the plaintiffs' mills; there being a very great head of water, a small column was sufficient to turn the mills. The distance between the plaintiffs' dam and that of the defendants, is about 30 rods. The object of the plaintiffs' dam is more for the purpose of turning the water into the canal, than for forming a pond. The mills of the plaintiff are near the *Hudson*, and the dam is about a quarter of a mile from the river. The approach from the river to the mills is through the *Binne-gat*, a small creek, on which there is a lock to deepen it for boats. The mills of the plaintiffs are extensive and valuable. The stream of the *Wynant's*, or *Mathias Kill*, has its source in three lakes, and is very uniform in its course. Since the defendants erected their works, the plaintiffs have added to their establishment.

A great many witnesses were examined on both sides, whose testimony, (and in which there appeared some contrariety,) was detailed in the case, but it is unnecessary to state it at large. *Stewart*, a witness for the plaintiff, testified, that *De-*

freest owned the stream, and the land on both sides, (except what he conveyed to *Whitbeck*,) from the *Hudson* river to the dam and works of the defendants, and continued to own the site of their works, until he sold to them in 1807. That the witness superintended making the first dam, and making the canal now owned by the plaintiffs. The new dam was raised three feet and a half above the old dam; that the new dam crossed the stream obliquely, and the north end was raised about a foot higher than the south, by agreement with *Defreest*, so as to throw the water into the canal, and the better to accommodate *Defreest's* saw mill. After the dam was raised, and the water stopped, *Defreest* found fault with it, as being raised higher than it ought to have been; and that it would make so much back *water as to injure the fulling mill which he owned above on the stream; and *Whitbeck* said that *Defreest* had a right to cut down the dam, if it was too high.

The defendants had built their dam to the height of about 24 feet, and erected rolling and slitting mills, and a nail factory. Before these works were erected, the plaintiffs' mills were supplied with a uniform and abundant flow of water. Afterwards, particularly from *July* to *September*, in 1815, the interruption to the water caused by the defendant's dam was such, that the plaintiffs' mills, having two, and afterwards three run of stones, during six or seven weeks, instead of grinding from fifty to seventy barrels of flour, made only about twenty barrels. The manner of this interruption was explained to be, that the defendants, during the time of heating a quantity of iron, which occupied more than an hour, entirely stopped the water in their dam, and when they, afterwards, let it out, it ran in such torrents that it was wasted by running over the plaintiffs' dam. By this irregular flowing of the water, occasioned by the manner in which it was used by the defendants, the mills of the plaintiffs were stopped from a half an hour to two hours daily.

Ashley, a witness, stated, that to remedy these evils he put a plank eight inches high on the plaintiffs' dam; but as the defendants complained of the back water, he lowered it again. The plaintiffs' mills were injured in a similar manner, in *July* and *August*, 1816. It was proved that there was a very severe drought during the summer and autumn of 1815, and of 1816. But it was testified, that there was water sufficient to turn the mills during that time, and that had not the defendants stopped the water in their dam, during the time of their taking heats at their mills, there would have been sufficient water to keep the plaintiffs' mills constantly employed. There was, however, a considerable diversity, in the opinions of the witnesses, as to the sufficiency of the supply of water, in *July*, *August*, and *September*, 1815, and 1816; and it appeared that there were about twenty mills of different kinds on the same stream.

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The judge charged the jury, that the first question for them to consider was, whether the injury to the plaintiffs, *during the years 1815 and 1816, arose in consequence of the defendants' stopping, and manner of using the water in *Wynant's Kill*, or by reason of the drought. That this was a question of fact which it was the province of the jury to decide; and if they should think that it was occasioned by the drought, the plaintiffs had no right of action. After commenting on the testimony, the judge proceeded to state to the jury, that as to the respective rights of the parties, as *Defreest* had conveyed to the plaintiffs, and as the defendants claimed under *Defreest*, they stood in the same place. That, generally, a person who owned a mill-seat at the mouth of a stream, had no more right than those above him; nor the person at the head of the stream than those below him. That where a living stream ran over the farms of different persons, it was a natural right to which all were entitled. That there was no doubt that the defendants had a right to erect a rolling or slitting-mill, and had as much right as the plaintiffs to the use of the water of the stream. But the question for the jury to determine was, whether the manner in which the defendants had used the water, in 1815 and 1816, was not inconsistent with the plaintiffs' rights? That it was correct to say, that the defendants could not use the water as they pleased. That, although they might use all the water of the stream, yet they could not lawfully do it, in such an unreasonable, unusual, and extraordinary a manner, as to destroy the works of those below on the same stream. They were not at liberty to inundate or flood those below, nor to exhaust the water, by turning it into a sandy plain. That although a person situated above another on a stream had the same right with those below him, yet he must be restricted to a reasonable use of his right. That the reason why an action would lie for the diverting of water, was that it deprived the mills below of the use of it; and if the same effect be produced, by unreasonably, wantonly, and improperly stopping or using the water, there ought to be some remedy. That although the term *diversion* was often used technically, yet the substance of its import ought to be regarded, and the nature of the injury, and the reason of the rule relative to diversions of water, ought to be taken into view. That if the *jury were satisfied that the stream would have furnished enough water for the plaintiffs' mills, then the proof was, that a few minutes after shutting the defendants' gate the plaintiffs' mills were stopped; and when the gate was raised the water was wasted, and, when it came, it was received so irregularly, and in such torrents, that the plaintiffs could not do good work at their mills.

Another question which he, therefore, submitted to the jury, was, whether, upon all the evidence, the defendants had been

guilty of such an unreasonable use of the water, as was improper, unjust, or injurious to the plaintiffs.

The plaintiffs' counsel having made a computation of the damages sustained by the plaintiffs, he was sworn as to the correctness of the results of his statement: and the judge told the jury, that they might take the paper, containing the statement, out with them; but the defendants' counsel objected to the paper being handed to the jury. The judge said that the counsel might do as he pleased as to handing it to the jury; and charged the jury, that it was in evidence that the results of the calculations on the paper were correct; and that the paper could be used only to ascertain such results, but not in relation to any other fact proved at the trial.

This statement showed the difference between 80 barrels and 30 barrels per day, in 1815, at 47 cents, for 35 days, amounting to 822 dollars and 50 cents: and in 1816, the amount of the same difference, for 42 days, amounting to 987 dollars, making, in the whole, 1,809 dollars and 50 cents.

The jury found a verdict for the plaintiffs for 700 dollars damages.

A motion was made to set aside the verdict, and for a new trial.

Buel, for the defendants. 1. There is a succession of mill-seats on the *Wynant's Kill* above that of the plaintiffs; and it is evident that *Defreest*, in his deed to *Whitbeck*, under whom the plaintiffs claim, intended to give a limited and specific grant. It conveys two acres of land, with the privilege of digging a raceway 12 feet wide, with liberty to *build a dam three feet and a half higher than the old dam, and to draw water out of the kill, and the *Binnegat*. *Defreest* had a fulling-mill where the dam of the defendants is, and from the fact of his limiting the dam of *Whitbeck* to three feet and a half, it is evident he meant to reserve his mill-seats. What was not specifically granted must be considered as reserved. The plaintiffs' rights cannot be extended by construction. This is an established principle of law. Where a person owns a stream, in which another has a right of fishing, the owner may erect mills on the stream, though it should impair the fishery; for the right of fishing is accessory; and if it becomes less useful by this exercise of the right of the owner, it is an accident merely.

"Rights ceded by the proprietor are considered as ceded without prejudice to the other rights that belong to him, and only so far as they may agree with them; unless an express declaration, or the very nature of the right, determine it otherwise. If I have ceded to another the right of fishing in my river, it is manifest that I have ceded it without prejudice to my other rights, and that I remain free to build on that

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river such works as I think proper, though they should even injure the fishery, provided they do not destroy it entirely." (*Vattel*, liv. 1. ch. 22. s. 273.) *Stewart's* testimony shows by the acts of the parties and the tenacity of *D.* about the height of the dam, how this grant was understood at the time. Should it be said that there are covenants in *D.'s* deed, by which the defendants, as claiming under *D.*, are bound, it may be answered that the covenants cannot extend further than the premises, or rights granted. Besides, the party should resort to his action on the covenant. The doctrine of *estoppel* cannot apply here. This is an action on the case for a tort.

Though the defendants can claim no more than was granted to them by *Defreest*, yet they may stand in a different relation to the plaintiffs or others, than to the grantors.

2. Here was a prior occupancy by *D.*, to whose rights the defendants have succeeded, by reason of the fulling-mill, which stood where the dam of the defendants now is. In cases of prescription, the change of mills, as from a fulling to a grist-mill, continues the prescription. (4 Co. *84.) But it has been settled that a prior occupation of a mill-seat, unaccompanied by such a length of time as will afford the legal presumption of a grant, gives no exclusive right to the water. (*Platt v. Johnson*, 15 Johns. Rep. 213.) Neither of the parties can show an occupancy for such a period of time. They stand, therefore, equal, in this respect. Each party has a right to use his own natural advantages in a lawful manner.

3. The question, then, is, whether the defendants have used their rights in a lawful and reasonable manner. The general rule is, that all persons have a right to the free use of a stream of water running through their lands. If a man use water on his own land out of a watercourse running through his land to the pond of *B.*, whereby *B.'s* pond is not so full, no action lies, if he does not divert the watercourse; (1 Comyn's Dig. 306. *Action on the case for a nuisance C.*) and the rule is founded on the principle, "That an action does not lie for the reasonable use of one's right, though it be to the annoyance of another. (1 Comyn's Dig. 305.) *Kames*, in speaking of the exercise of opposite rights, lays down the same principle: Though "the exercising my right will not justify me in doing any action that directly harms another—and so far my interest yields to his"—yet, "that in exercising my right I am not answerable for any indirect or consequential damage that another may suffer; and so far the interest of others yields to mine." (1 Principles of Equity, 46. B. 1. s. 1.) As a consequence of this just principle, every person may enjoy and use the peculiar and superior local advantages he may possess on a river or stream, for his own benefit, though it may, in its consequences, be detrimental to another. This principle is fully adopted in the law of *France*. (*Code Nap. Art. 640, 641*
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644.) (a) The same principle is laid down by *the Supreme Court of *Massachusetts*, in the case of *Westen v. Alden*. (8 *Mass. Rep* 136.) It was decided that the owner of land adjoining to an ancient brook of running water, may lawfully use the water for the purposes of husbandry or irrigating his land; and if the owner of the close below is damaged thereby, no action lies: it is *damnum absque injuria*. No doubt an action will lie for *diverting* a watercourse. *Blackstone* (3 *Comm.* 218.) says, "it is a nuisance to stop or divert water that uses to run to another's meadow or mill;" and he cites *Fitzherbert*, (*Nat. Brev.* 184.) who speaks only of a *diversion* of the water. The position is true only when confined to a wanton or malicious stoppage of the water; or where the plaintiff has a *prescriptive* right to the water. So, when *Blackstone* speaks of *prior occupancy* as giving "a property in the current," he must mean such an occupancy for such a length of time as to produce a prescriptive right. All the cases in which actions have been maintained in the *English* courts, are either for *diverting* the stream, or causing the water to *flow back*; or where the plaintiff has a *prescriptive* right to the water. (*Dyer* 248. (b.) 3 *Mod.* 48. 1 *Wils.* 174. 6 *East*, 213. 10 *Johns. Rep.* 241.) Indeed, this subject has been fully discussed, and the principles settled in two cases which have arisen in this court. (*Palmer v. Mulligan*, 3 *Caines*, 307. and *Platt v. Johnson*, 15 *Johns. Rep.* 213.) There must be a *diversion* of the stream; an unnecessary waste of the water; or a wanton and wilful detention of it, to afford a ground of action. "For justice," says Lord *Kames*, "will not permit a man to exercise his right, when his *intention* is solely to hurt another." Now, we contend, that there was no evidence in this case of any wanton detention of the water by the defendants; nor can any wrong motives be imputed to them. It was necessary for them, in order to use their iron works advantageously, to shut the gates while the iron was heating. Besides, there was sufficient evidence to show that the failure of water, in 1815 and 1816, was owing to the severe drought.

*4. The judge's charge, though correct as to the law as far as it went, was calculated to mislead the jury, by not explaining what the law meant by an "unreasonable, improper, and unjust use of the water."

5. Improper evidence was admitted. The paper containing a statement of the damages sworn to by the plaintiffs' counsel,

(a) "Celui qui a une source dans son fonds, peut en user à sa volonté, sauf le droit que la propriétaire du fonds inférieur pourrait avoir acquis par titre ou par prescription."

"Celui dont la propriété bord une eau courante, autre que celle qui est déclarée dépendance du domaine public, par l'article, &c.—peut s'en servir à son passage pour l'irrigation de ses propriétés."

"Celui dont cette eau traverse l'héritage, peut même en user dans l'intervalle qu'elle y parcourt, mais à la charge de la rendre, à la sortie de ses fonds, à son cours ordinaire."

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ought not to have been allowed to go to the jury. (*Gilb. Ev.* 21, 22. 1 *Trials per Pais*, 257.)

Mitchell and Van Vechten, contra. 1. The jury, by their verdict, have found that the injury sustained by the plaintiffs was occasioned by the unreasonable and improper conduct of the defendants; and it is not correct to contend, that it was owing to the drought. The court are to give their opinion on the facts found by the jury. That there was a contrariety of evidence is no ground for a new trial. (1 *Wils.* 22. 2 *Str.* 1142. 3 *Wils.* 47. 3 *Johns. Rep.* 271.)

It is said that no action lies, unless there has been a *diversion* of the stream, or a malicious and wanton detention of it. It is conceded, however, that for throwing back water on a mill above, an action will lie. If so, why should not the owner of a mill below be equally protected? It is not essential that the injury should have been done maliciously. For where an act is done, which, consequentially or collaterally, injures another, an action on the case lies. For every wrong there must be a remedy. (2 *Bl. Com.* 122, 123. 217. 1 *Kames's Pr. Equ.* 41, 42.) The question is, whether the rights of the plaintiffs have been infringed. It is not denied, that the plaintiffs have all the rights which were in *Whitbeck*. It is a grant of the water in the *Kill*. But even where there is a presumption of grant arising from the long time a person has been in the use or occupation of the water of a stream, the subsequent grantee must take subject to such grant. (*Bealy v. Shaw*, 6 *East*, 208. 214, 215.) The defendants, claiming under *D.*, must take subject to the grant to the plaintiffs. The incorporeal right of the plaintiffs is to turn the water of the *Kill*, through a canal, to their mill; but the defendants have withheld the water, *and thereby infringed the right of the plaintiffs. There is no ground for the suggestion that the water above was impliedly reserved for *D.*'s mill. The covenants in the deed from *D.* to *W.* run with the land, and though the defendants are not parties, yet they are bound by them, in respect to the land. (5 *Co.* 16. *b.* 2 *Bac. Abr. Cov.* E. 3.) It is true, the plaintiffs do not claim on the covenants, but they refer to them to show their rights; and the defendants are estopped to deny them. The plaintiffs might here rest their cause; but as there are several mills above, on the same stream, it is important to have the rights of the owners determined.

2. The owner of a mill on a stream of water is bound to let the natural flow of the stream pass on, at all times, to those below him. It is conceded, that the rights of all the owners of mill-seats on the same stream are, in this respect, equal; that is, each has an equal right to use the natural advantages of his situation. A living stream passing over the land of several persons, is a privilege or advantage derived from nature, and incident to the land. This natural privilege cannot

be taken away or destroyed by one who happens to be above the others, or nearer to the source of the stream. Prior occupancy cannot vary the right, unless it has been exclusive and uninterrupted, for at least twenty years. These principles are well settled. (6 *East*, 214, 215. 3 *Caines*, 307. 15 *Johns. Rep.* 213. 2 *Domat*. B. 1. tit. 8. s. 2. 383—385.) The party must so construct his dam, and so use the water, as not to injure his neighbors below in the enjoyment of the water, according to its natural course. (*Sackrider v. Beers*, 10 *Johns. Rep.* 241.) The only qualification is the case of a prescription; but no prescriptive right can be set up here. The natural right is to raise the water by a dam, so far as to set your mill in operation; but when that is done, you must let the water flow over, and run down, so that others may use it. You cannot stop the water further, or longer, than is absolutely necessary for the enjoyment of your natural rights. If any injury arise from such a lawful and reasonable use of your rights, no action lies. Here there *was no necessity for detaining the water; for the defendants might have used the water for their mills, and have let two thirds of it pass on to the plaintiffs. It is said, that the defendants might use the water for irrigation. True; but they cannot exhaust it by such a use. The plaintiffs, who are the prior occupants, have expended immense sums in the erection and improvements of their mills; and if the doctrine of the defendants is to prevail, the injury to the plaintiffs must be ruinous. But it has been insisted, that no action lies, unless for *diverting* the stream; but that doctrine is not to be found in *Comyn*; and Lord *Kames*, after much fanciful speculation, comes back to the good old rule, *sic utere tuo, ut alienum non lædas*. He enumerates six different purposes to which water may be applied, and which ought to have a preference to other objects; and the last and lowest of these purposes, is the use of water for machinery. Now, the object of the plaintiffs being to grind corn, it is, according to this writer, to be preferred to that of the defendants. An action for the diversion of a stream is, substantially, an action for depriving the plaintiff of the use of the water to which he is entitled. The injury complained of, is the being deprived of the use of the water; the manner in which this has been done can make no difference, if the rights of the plaintiff have been infringed. The rights of the parties being equal, the defendants must so use their rights as not to injure the plaintiffs. Where a defendant had a piece of water supplied by a stream, from which a mill of the plaintiff's was supplied, and the defendant sometimes kept back the water, and at other times let it out in such quantities that the mill was overflowed, the Court of Chancery granted an injunction to restrain the defendant from preventing its flowing in regular quantities. (1 *Ch. Cas.* 574. 1 *Bro. C. C.* 588. 1 *Madd. Ch.* 129. *Saunders v. Newman*, 1 *Barn. & Ald. Rep.* 258. *Book of Assise*,

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146. 16 *Vin. Abr.* 26. tit. *Nuisance*, pl. 7. 9. p. 27. pl. 21. p. 29. pl. 20.)

3. The judge's charge was correct; he did not misdirect the jury.

4. As to the objection, that the statement sworn to by *the plaintiffs' counsel ought not to have been delivered to the jury. The jury may take with them any paper which has been read in evidence; (*Tidd's Pr.* 795. 3 *Johns. Rep.* 252.) and under the directions given by the judge, there was no danger of its having any improper influence

Henry, in reply. The rules of law as to the use of running water, are not perfectly clear and well settled; and if the court should have any reason to doubt whether justice has been done in this case, they will direct a new trial. Except in seasons of extraordinary drought, it appears that the plaintiffs have had an abundant supply of water for the use of their mills. A drought is a public and common calamity; and the defendants, in the reasonable and customary exercise of their rights, ought not to be made liable for the damages which the plaintiffs may have sustained at such a season.

If the plaintiffs have not acquired by grant an exclusive right to the water of this stream, the defendants are not accountable to them. The plaintiffs were limited as to the height of their dam; undoubtedly for the purpose of reserving to the use of the grantor and his assigns, the use of the mill-seat above. Parcel or not may be shown by parol. A covenant cannot restrain, if the grant does not. It does not run with the land, if the party has no interest in the land. The plaintiffs have nothing more than a right, in common with the defendants, whose rights are the same, in this respect, as if derived from a stranger. It is true that the mill above was then only a fulling-mill; but the defendants were not limited in the use of the water to a fulling-mill only. The community of use was for any kind of mills. And, unless the plaintiffs can show an express and exclusive grant or prescription, the stream is to be enjoyed in common, by all the occupants. If the defendants have used their rights for their own benefit, in a reasonable manner, and for the ordinary purposes of their mill, they ought not to be answerable for any indirect or consequential damage. If we had a right to erect a mill, which cannot be denied, we had a right to use so much of the water as was sufficient to turn it. No doubt, an action lies for an improper or unlawful *use of the water. The case of *Saunders v. Newman*, (1 *Barn. & Ald. Rep.* 258.) was for forcing back the water, and injuring the plaintiff's mill. The obstruction must be such as to prevent the water from flowing in its usual and accustomed course. The principle of that case does not militate against the defendants. The doctrine is, that the water of a running stream cannot be so obstructed or stopped in its natural flow, as to

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injure another. Now, the evidence in this case shows, that there has been no waste of water by the defendants, nor any obstruction of its natural course. The plaintiffs can only have a dam of three and a half feet; and the defendants, by erecting an excellent dam, to raise a head of water, have done a thing most beneficial to the plaintiffs. If the defendants had no right to do this, their mills may be as well destroyed. If the facts are attentively examined, it will be manifest, that the want of water was caused by the drought alone. The evidence shows that the defendants were particularly careful to use the water in a manner the least detrimental to the plaintiffs. Except in the months of *July, August, and September*, in 1815 and 1816, the plaintiffs had water enough. (Here the counsel entered into a particular examination of the facts.) The plaintiffs saw the defendants erecting their dam and mills, and never made an objection or complaint. Equity would grant an injunction against a suit at law, under such circumstances. (2 *Equ. Cas. Abr.* 522.)

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The jury must have misunderstood the principles of law laid down by the judge, or disregarded them; or they must have been led to believe, from the paper delivered to them, that if the defendants had detained the water unreasonably, the plaintiffs were entitled to the damages stated, without making allowance for the common calamity of a drought.

WOODWORTH, J., delivered the opinion of the court. In this cause the defendants apply for a new trial on several grounds: 1st. That the verdict is against law.

2d. That the judge misdirected the jury, and admitted improper evidence.

3d. That the verdict is against the weight of evidence.

*4th. That the damages are excessive.

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For the plaintiffs, it was contended, that, in consequence of the grant from *David Defreest* to *Thomas L. Whitbeck*, under whom they derived title, a right to the undisturbed use of the water was acquired, and that the plaintiffs, as prior grantees of a common grantor, and as prior occupants pursuant to their grant, can sustain the present action against the defendants, and are entitled to recover the damages they have sustained. The grant has no bearing upon the point, whether the defendants are liable, but leaves it to be decided upon different principles. *Defreest* granted two acres of land, the privilege of digging a raceway or canal, and also of erecting a dam, to raise the water three feet six inches higher than the dam then was, with liberty to draw the water out of the kill through the canal so to be dug. The words of the grant being definite and certain, they are not to be extended by construction, so as to deprive the grantor of his mill privileges at other places on the same stream. *Whitbeck's* grant is satisfied by allowing him to erect a dam, and by means thereof to draw the

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water from the creek to the canal: it does not convey the use of all the water, by a regular flow, uninterrupted by mills, or water works above the plaintiff's dam, and within the limits of the grantor's right, but so much only as could be obtained consistently with the right the grantor had, to erect mills and place dams above: It was intended that each party should have a community of right to the use of the water, leaving the question, what shall constitute a lawful use, to be settled by the general principles of law, independent of the grant, should a conflict arise, thereafter, between the grantor and grantee, or their assigns.

Nor does the prior occupancy of the plaintiffs give them an exclusive right to the undisturbed use of the waters. In the case of *Platt v. Johnson and Root*, (15 Johns. Rep. 213.) *Thompson*, Ch. J., says, "To give such an extension to the doctrine of occupancy would be dangerous and pernicious in its consequences. The elements being for general and public use, where the benefit of them is appropriated to individuals, by occupancy, this occupancy must *be regulated and guarded, with a view to the individual rights of all who have an interest in their enjoyment."

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Neither party, then, having a superior right, by grant or prior occupancy, but both being entitled to a common use, the inquiry is, Have the defendants withheld the water from the plaintiffs' mill, and wasted it either wantonly or unreasonably? It is a question of law, undoubtedly, whether the facts in any given case establish a right to recover; what the facts are, is exclusively within the province of the jury, subject to the review of the court, when an application is made to set aside the verdict. The common use of the water of a stream, by persons having mills above, is frequently, if not generally, attended with damage and loss to the mills below; but that is incident to that common use, and, for the most part, unavoidable. If the injury is trivial, the law will not afford redress; because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream, has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation, that if, in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law, in that case, will interpose, and limit this common right, so that the owners of the lower mills shall enjoy a fair participation; and if, thereby, the owners of the upper mill sustain a partial loss of business and profits, they cannot justly complain, for this rule requires of them no more than to conform to the principle upon which their right is founded. It cannot, then, be admitted, that the defendants may use the water as they please, because they have a right to a common use, although their works may require all the water, in order to derive the greatest profit. The plaintiffs' rights

must be regarded ; they must participate in the benefits of the stream, to a reasonable extent, although the defendants' profits may be thereby lessened. If the defendants insist on the unrestricted use of the water, and appropriate it accordingly, and this proves destructive to the mills below, the law in that case allows the party injured a compensation in damages, to the extent that, under all the circumstances, shall be considered an equivalent : In *that event, the plaintiffs receive no more than they would have realized by their business, had the defendants permitted the water to flow in a reasonable manner. If the defendants had run short heats in 1815 and 1816, it would have materially benefited the plaintiffs' mills ; whether it would have enabled the plaintiffs to manufacture 50 or 70 barrels of flour in a day, is not ascertained, but there is no doubt that the quantity manufactured would have been considerably increased.

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The jury have passed on the facts submitted to them. The verdict ought to stand, unless it is against the weight of evidence, or the jury were misdirected in point of law. It is contended, on the part of the defendants, that the judge did not instruct the jury correctly, as to the law applicable to the case. After having stated that the first question would be, whether the injury sustained was in consequence of the drought ; and, secondly, whether the plaintiffs' dam was higher than it was agreed to be, the judge proceeded to state the law, and illustrate the principles upon which the action could be sustained. The objection seems to be, that the charge was not explicit, in stating what was right and lawful ; but submitted to the jury " whether the manner in which the defendant had used the water, in 1815 and 1816, was not inconsistent with the plaintiffs' right." It will be seen, I apprehend, that this is a mistaken view of the subject : the charge admits that the parties had equal rights to the use of the water, but that it was not correct to say, the defendants could use it as they pleased ; although they were entitled to the use of all the water of the stream, yet they could not lawfully use it " in an unreasonable manner, so as to destroy those below on the stream." The judge explained this general position by a number of pertinent remarks, and intelligibly, I think, stated the law to the jury. The gravamen is, that the injury complained of is destructive of the plaintiffs' rights : that, if the principle contended for by the defendants can be supported, the plaintiffs' mills, in a dry season, would be nearly useless. How, then, could the jury be in doubt as to the law, when the judge informed them it was unlawful for the defendants to use the water so as to destroy the mills below, and then *submitted to them, whether the manner of using the water by the defendants had not been materially injurious, and destructive to the plaintiffs' mills. This is substantially the charge as delivered, in which the law

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was correctly laid down, and the questions of fact growing out of the case submitted, in a proper manner, to the jury.

But it is urged, that the paper containing a calculation of the damages sustained was improperly admitted. The judge observed to the jury, that the results of the subtractions and multiplications on the paper were correct, and that it must be used only to ascertain such results, but not in relation to any other fact proved on the trial; it could not, therefore, come within the rule which prohibits the delivery of writings not sealed to the jury, when they retire to consider of their verdict; (1 *Tidd. Pr.* 795.) but what seems to remove every objection is, that it may fairly be inferred, that the jury were not influenced by that calculation in giving their verdict. (3 *Johns. Rep.* 252. *Tidd.* 799. 779.) If they had assumed that calculation, the damages would have been considerably more than double; they must have, then, taken a different rule in reducing the damages 1,100 dollars below the amount claimed by the plaintiffs.

It is further contended, that the verdict is against the weight of evidence, and therefore a new trial ought to be granted. The question is, not whether the court might have differed from the jury, had the facts been submitted to their decision, but whether the testimony is so unequally balanced, that, in the exercise of a sound discretion, they are required to send the cause to another jury. Without going into a detail of the evidence, I think I am warranted in saying, that, although there was conflicting testimony, and some difference of opinion, whether the injury sustained was in consequence of the drought in 1815 and 1816, there is but little doubt that the natural flow of the water, uninterrupted by the defendants' works, would have been sufficient, or nearly so, for the plaintiffs' mills; and that, low as the stream was, during those seasons, had the defendants allowed the plaintiffs that reasonable participation in the use of the water, which by law they had a right to require, the damage sustained would have been materially less, if *not inconsiderable; but, allowing that the evidence does not conclusively establish this fact, I am satisfied that the verdict on this point was not against the weight of evidence. With respect to the question, whether the use of the water by the defendants was such as to prove ruinous and destructive to the plaintiffs' mills, it cannot well be doubted, that if the injury was not occasioned by the drought, it resulted from the acts of the defendants. Their works required double the quantity of water used by the plaintiffs' mills; they shut down their gates for several hours, and then let out the water in torrents; the plaintiffs' dam could not be constructed so as to detain more than a small portion; the surplus was, consequently, wasted. The jury, on a review of the testimony, must have been satisfied that the plaintiffs had made out a case

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entitling them to redress, according to the general principles of law laid down by the judge; and the court consider that evidence sufficient to warrant such a conclusion.

It has been argued, that the damages are excessive, and that the judge should have instructed the jury, that if the defendants were liable, it could only be for the use of the water beyond their relative proportion. The court do not perceive any misdirection in this particular; it followed, as a necessary consequence from the charge, that, in estimating the damages, the jury must be governed by this principle. It is not claimed by the plaintiffs, that any right to recover arises for the use of such relative proportion, but that the defendants, having unreasonably appropriated the water, in carrying on their own works, so as to deprive the plaintiffs of a beneficial use of it, thereby made themselves liable. In assessing the damages, it was undoubtedly proper to consider, that in 1815 and 1816, there was a great drought, and to make all proper deductions, as far as that cause had contributed to the plaintiffs' injury; there is no reasonable ground to believe, that the jury were inattentive to this circumstance; the amount of the verdict is less than one half of the damages proved.

In refusing to grant a new trial, the court do not intend to question the law in *Platt v. Johnson & Root*, (15 Johns. Rep. 213.) This case is clearly distinguished, and does not impair that decision. In the case referred to, the court say, "The principle sought to be established is, that a previous occupancy of land upon a stream of water, and an appropriation of the water to the purposes of a mill, gives such a right to the stream in its whole extent above, as to control the use of the water, so as to prevent any subsequent occupant from using or detaining the water to the least injury or prejudice of the first occupant; that unless the principle thus broadly stated, could be supported, the plaintiff must fail."

Now, in this case, the right to recover is not placed on the ground of prior occupancy, and when the facts in the two cases are compared, it will be seen they are materially different. In *Platt v. Johnson & Root*, it is stated, "that in very dry seasons the plaintiff had occasionally to wait for the water, until the defendants had raised a pond sufficient to turn their mills;" it is not alleged, that the water was let out in such quantities as to become lost to the plaintiff, or to deprive him of a beneficial use, but, on the contrary, "he might so alter his dam as to save all the waste water; that in dry seasons the usual quantity of water in the stream was sufficient to grind from ten to twenty bushels in a day, but when the grist-mill had a full head of water, it would grind sixty or seventy bushels a day, and that the plaintiff's mills were turned with much more force when the defendants raised their gates, by reason of the increased quantity of water." From this statement, it is evident that the plaintiff's damages must have been trifling; that

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there could have been no well founded complaint that the water was wasted, but, on the contrary, it may be inferred, that the defendant's dam was rather beneficial to the plaintiff than otherwise.

The court are, accordingly, of opinion, that the motion for a new trial must be denied. (a)

Motion denied.

(a) Vide *Livingston v. Adams*, 8 Cowen, 175. *Stiles v. Hooker*, 7 Cowen, 266.

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*TILLMAN against WHEELER. (a)

Where A., on the purchase of goods of the plaintiff, on a credit, agreed to give him his note with a good endorser, or satisfactory security, and brought to the plaintiff a note made by A., payable to the plaintiff, or order, endorsed by the defendant in blank, and the plaintiff thereupon took the note, and delivered the goods to A.

In an action brought by the plaintiff against the defendant, as *guarantee* of the note, it was held, that the defendant was not liable as a *guarantee*; the blank endorsement never having been filled up with any express guaranty. And, there being no proof to the contrary, it was to be intended, that the defendant meant

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merely to become a *second endorser*, with all the rights incident to that character.

IN ERROR to the Court of Common Pleas of *Ontario* county. *Wheeler* brought a suit in the court below, on a promissory note, dated the 7th of *June*, 1815, made by *Francis Moore* and *Jeremiah Abby*, payable to the plaintiff, or order, on which the defendant below, *Tillman*, had endorsed his name in blank. The declaration contained several counts, one of which stated, that whereas, &c., in consideration that the plaintiff, at the special instance and request of the defendant, would sell and deliver to *F. M.* and *J. A.* divers goods, &c., of the value of 200 dollars, on a credit, to be paid on the 7th of *June*, then next; and that the plaintiff would, at the like special instance and request, receive of and from the said *F. M.* and *J. A.*, their certain promissory note in writing, made by the said *F. M.* and *J. A.*, bearing date, &c., whereby the said *F. M.* and *J. A.*, for value received, promised to pay to the plaintiff, &c. the said sum of 200 dollars, on the 7th day of *June* next, with use, and in consideration that the plaintiff would give time for the payment of the said sum of 200 dollars until the 7th of *June*, then next, according to the tenor and effect of the said promissory note, the defendant, by a certain note or memorandum in writing, signed by the defendant, and endorsed upon the back of the said promissory note, then and there undertook and faithfully promised the said plaintiff to *guaranty* to him the payment of the said sum of 200 dollars, with the interest, at the time in the said note specified; and the plaintiff averred, that, confiding in the said promise and undertaking of the defendant, he did sell and deliver to *F. M.* and *J. A.* the goods, &c., on a credit, &c., and took their said promissory note, &c., and although, &c.

The defendant pleaded *non assumpsit*, with notice of special matter to be given in evidence. At the trial, the *plaintiff produced the note signed by *F. M.* and *J. A.*, as above mentioned, on which was endorsed the name of the defendant in blank, without any other writing thereon. The plaintiff proved

(a) This and the two following cases were decided in *October* term.

that the makers of the note, being desirous to purchase of the plaintiff a quantity of leather, on a credit, offered to give their joint note; but the plaintiff refused to sell the leather to them on a credit, unless they procured a good endorser or satisfactory security, and, among other persons, he named *Tillman*, as a person with whose security he would be satisfied; that *F. M.* and *J. A.* soon afterwards applied to the plaintiff for the leather, and produced the above mentioned note, executed by them, and endorsed by *Tillman* in blank, but without any agreement or undertaking, in writing, to guaranty the payment of it; and the plaintiff, in consideration of the note, and solely on the responsibility of *Tillman*, as he then declared, sold the leather to the said *F. M.* and *J. A.*, &c.; but *Tillman* was not present or privy to any of the conversation between the plaintiff and the makers of the note. The plaintiff having rested his cause on this evidence, the defendant's counsel insisted that he had not given sufficient evidence to support his action; not having proved any express or implied agreement on the part of the defendant to guaranty the payment of the note; and who could not be made liable in any other way than as endorser of the note. The plaintiff's counsel insisted, that the plaintiff having refused to sell his goods without security, and having, in consideration of the note so made and endorsed, sold and delivered the goods, the defendant ought to be considered as having guarantied the payment of the note, and to be charged with the payment thereof, and that the plaintiff had a right to enter over the name of the defendant a guaranty comporting with the counts in the declaration, so as to take the case out of the statute of frauds. The court declared their opinion to be, and so charged the jury, that, under the facts proved, the plaintiff was entitled to recover the amount of the note of the defendant; that the plaintiff was not bound to prove any express promise in writing by the defendant, further than had been already shown; and as, by reason of the note so endorsed, the plaintiff *had parted with his property, the defendant was to be considered as having guarantied the payment of the note. The jury accordingly found a verdict for the plaintiff for 237 dollars and 66 cents.

A bill of exceptions was tendered to the opinion of the court, on which the writ of error was brought.

Townsend, for the plaintiff in error, contended, that the plaintiff in error was to be considered as an endorser only of the note, and could not be made liable as a *guarantee*. He cited *Nelson v. Dubois*, (13 *Johns. Rep.* 175.) *Herrick v. Carman*, (12 *Johns. Rep.* 159.) and *Campbell v. Butler*, (14 *Johns. Rep.* 349.) as bearing on the question. Here there was no express guaranty written over the name of the plaintiff in error; and the proof, therefore, did not support the declaration; and, according to the opinion of *Spencer. J.*, in *Herrick v. Car-*

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man, in absence of any proof to the contrary, it must be intended that *Tillman* meant only to become the *second endorser*, with all the rights incident to that situation.

Again; if *T.* was sued as a surety or guarantee, the plaintiff was bound to show that he had resorted to the principal for payment, without effect. (2 *Johns. Cases*, 409. 15 *Johns Rep.* 425.)

Parker, contra, insisted, that *T.* was to be considered as an original party or guarantee of the note. (*Leonard v. Vredenbergh*, 8 *Johns. Rep.* 29.) The court will presume that the blank endorsement was filled up, so as to support the declaration. (*Pangburn v. Ramsay*, 11 *Johns. Rep.* 141. *Elting v Vanderlyn*, 4 *Johns. Rep.* 237.)

YATES, J., delivered the opinion of the court. It does not appear from the return, that *Tillman* knew for what purpose the note was designed, or that there was any promise to, or communication between, him and the holder of the note; nor is any liability shown, except such as he would be subject to as the endorser of an ordinary negotiable promissory note.

This case is not distinguishable from *Herrick v. Carman*, *(12 *Johns. Rep.* 159.) except that the suit was in that case brought against the person signing, as *endorser*; and in this case, on the implied special agreement or guaranty. They do not, however, vary in principle. The liability in this case was the same. For aught that appears, *Tillman*, for the accommodation of the drawers, and the original payee, or first endorser, may have put his name on the note as second endorser, on the responsibility of the payee; this is the legal presumption from the appearance of the paper, without any explanatory proof, or a special undertaking on the part of *Tillman*, who does not appear to have known any thing of the original contract between the drawers and the payee; nor can the court infer from any thing in the case, that he was privy thereto. In the cases cited from 13 *Johns. Rep.* 175. 14 *Johns. Rep.* 349. and 15 *Johns. Rep.* 425., the endorser had either been present and agreed to guaranty the payment, or it appeared in proof that he knew the extent of his endorsement to be as alleged, which is not the case here.

The proof, that *Wheeler* declared he delivered the goods solely on the responsibility of *Tillman*, cannot vary the nature of the paper he gave, unless it should also appear that such declaration was made to *Tillman*, or was known to him, at least, before he endorsed the note; but that does not appear. If, under the circumstances of this case, the endorsement be construed to be a special guaranty, and an original contract in consideration of the delivery of goods, there is no case in which a note, innocently endorsed by a second endorser, previous to the endorsement by the first, in which, without his knowledge,

the responsibility may not be varied. The judgment below must be reversed, and a *venire de novo* issue, returnable at the next *Ontario* circuit.

Judgment reversed.

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MARTIN
v.
WILLIAMS.

MARTIN against WILLIAMS, Executor of WILLIAMS

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IN ERROR, to the Court of Common Pleas of *Washington* county. *Williams*, as executor, &c., brought an action of *assumpsit* against *Martin*, in the court below. The declaration contained three counts: 1. An *insimul computassent*, with the testator, and a promise to pay him. 2. An *insimul computassent*, with the testator, and a promise to pay the plaintiff, as executor. 3. An *insimul computassent*, with the plaintiff, as executor, and a promise to pay him. The defendant pleaded: 1. *Non assumpsit*. 2. *Non assumpsit infra sex annos*. To the second plea, the plaintiff replied, that the defendant did assume, &c., within six years, &c.

At the trial, the plaintiff below produced a book, in which was written: "12th *August*, 1799, then settled accounts, obligations, and all matters and things to this date, and due *John Williams* 670 dollars and 24 cents—*John Williams*." "Received of the above, 450 dollars, and then due, on a final settlement, to *John Williams*, 175 dollars 24 cents;" signed, "*John Williams, Walter Martin*."—"14th, received of *Walter Martin*, Esquire, 100 dollars;" leaving a balance due of 75 dollars. A witness for the plaintiff proved, that four or five years before the trial, the defendant told him that he and the testator had settled, and that he had paid the testator all but 75 dollars. The plaintiff having rested his cause, the defendant's counsel moved for a nonsuit, which was overruled. The defendant then offered to prove, that in the life time of the testator, the defendant and *James Hawley* were partners in trade, and, as partners, sold and delivered goods to the testator, to the amount of 300 dollars; and that *Hawley* afterwards, and before the death of the testator, and before the commencement of this suit, assigned the said debt or demand to the defendant; and that after the death of the testator, the plaintiff, his executor, undertook and promised to pay the defendant the 300 dollars; and which sum he offered to *set off. This evidence was objected to, on the ground, that the demand was barred by the statute of limitations. And the court rejected the evidence, because the defendant had not stated in his notice, annexed to his plea, that he should rely on the new promise of the plaintiff. The jury, under the direction of the court, found a verdict for the plaintiff, to the amount of his damages.

In an action of *assumpsit* brought more than six years after the debt accrued, it is not necessary to aver a new promise within the six years; but proof of an acknowledgment of the debt, within the six years, is sufficient to repel a defence set up under the statute. So, where the defendant offers to set-off a demand against the plaintiff, which accrued more than six years before the bringing of the suit, it is not necessary that the defendant, in the notice annexed to his plea, should state a promise to pay within the six years; nor is it any objection that the demand offered to be set off was not originally due to the defendant, but had been assigned to him, the assignment being

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before the commencement of the suit.

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The defendant tendered a bill of exceptions to the opinion of the court below, on which a writ of error was brought; and on the return to which, the case was submitted to the court without argument.

YATES, J., delivered the opinion of the court. The statement of the defendant, *that he and the testator had settled, and that he had paid him all but 75 dollars*, is an acknowledgment of the debt. In *Johnson v. Beardslee*, (15 Johns. Rep. 4.) this court decided, that an acknowledgment of the debt is evidence sufficient for the jury to presume a new promise, when, as in this case, it was not accompanied with a protestation against paying it. The motion for a nonsuit was, therefore, correctly overruled. (a)

But the testimony offered to prove the amount claimed as a set-off, ought not to have been rejected, on the ground of the statute of limitations, when it was accompanied with a new promise on the part of the executor to pay. Though the facts offered to be proved, do not state the promise of the plaintiff, as executor, &c., to have been made within six years, we have a right to infer that it was so understood at the time, as the ground on which the court overruled the testimony is stated to have been, because it did not appear, by the notice annexed to the plea, that the defendant intended to rely on the new promise. It might as well be said, that in a declaration on a note of hand, where the suit is commenced six years after the date of the note, an averment of a promise within that period would be necessary. And it is no more necessary for the notice to contain an averment that the defendant relied on the new promise. He relied on the debt due from the plaintiff's testator, which had been assigned to him, as a proper subject of set-off, and was prepared to meet the objection to it, arising *from the statute of limitations, by proving a promise on the part of the executor to pay it, which could not be the case without an express reference to the original debt.

The notice annexed to the plea is not in the record or case; but it seems to have been admitted on the trial, that it would have been sufficient if it had stated that the defendant intended to rely on the new promise. It must, therefore, be taken for granted, that it contained the original debt due *Martin and Hawley*, and the assignment of it to the defendant, previous to the death of the testator and to the commencement of the suit.

That an account thus assigned is deemed a proper subject of set-off, is now well settled. The broad principle laid down

(a) Vide *Bradley v. Field*, 3 Wendell's Rep. 272. *Doshout v. Thompson*, 20 Johns. Rep. 277. *Bryar v. Wilcocks*, 3 Cowen, 159. *Clark v. Dutcher*, 9 Cowen, 674. *Schermerhorn v. Schermerhorn*, 5 Wendell's Rep. 513.

in *Tuttle v. Bebee*, (8 *Johns. Rep.* 152.) clearly embraces it. But as no objection was made to it on this ground at the trial, the question is not now before us. For the reasons before mentioned, the judgment must be reversed, and a *venire de novo* issue, returnable at the next *Washington* county circuit.

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DICKENSON
v.
COOK.

Judgment reversed.

DICKENSON *against* COOK.

THIS was an action of *trover* for a pair of horses, harness, and wagon, a table, clock, bureau, ten pictures, six chairs, &c.

A judgment was recovered in this court by *Roswell Reed* against *Thomas H. Hoghtaling*, on which a writ of *fiery facias* was issued in *May*, 1817, to the sheriff of the county of *Greene*, returnable at the next *August* term, with directions to levy 1,087 dollars, with interest, &c. The property *specified in the declaration, being in the possession of *Hoghtaling*, was levied upon, and, except the wagon, sold by the sheriff under the execution in *June*, 1817, and purchased by the plaintiff; the plaintiff proved that the wagon never was the property of the defendant, but belonged to the plaintiff. The plaintiff proved that the defendant, in *June*, 1818, levied on the property in question, being then in possession of *H.*, and sold the same.

The defendant proved that, as deputy sheriff, he levied on the property in question in *June*, 1818, by virtue of a *fiery facias* issued out of the Court of Common Pleas, in *May*, 1818, on a judgment in that court against the said *H.*, in favor of *Philip Conine*, and sold the same; and that after the purchase above mentioned by the plaintiff, the property had remained in the possession of *H.*, until it was so taken and sold by the defendant.

It was proved, on the part of the defendant, that, besides the articles specified in the declaration of the plaintiff, he purchased at the same sale of the sheriff, 30 cords of wood, 40 cords of hemlock wood, two cows, one bull, a steer, four bushels of rye for seed, a fanning mill, a sleigh, oats, corn, and flax in the ground, hay, a plough, &c., and that he took away only the wagon, the cow and steer, leaving all the rest of the property purchased by him in the possession and use of *H.*, who continued in possession thereof until the sale by the defendant: that *H.* used the horses, and fed them with the grain and hay so purchased by the plaintiff; and that *H.* sold eight or ten cords of the wood. It was proved that there was no agreement between the plaintiff and *H.*, relative to the property

Where the purchaser of goods on a sale under an execution, suffered them to remain in possession of the debtor for more than a year after the sale, without an agreement between them, or the debtor paying any thing for the use of the goods, but permitting him to sell some of them, and apply the proceeds to his own use, the transaction was held to be fraudulent and void, as against a subsequent creditor, under whose execution the same goods were taken and sold.

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so left in the possession of *H.*, and that nothing was paid by *H.* to the plaintiff for the use of it.

It was also proved, that *H.* owed the plaintiff 900 dollars, for a house which he purchased of him, and on which he gave a mortgage to the plaintiff to secure the purchase money. That the plaintiff owed *R. Reed* 1000 dollars, for which he had executed a mortgage on the same house and other property, and the plaintiff proposed to *R.* to advance *H.* 100 dollars, and that a judgment should be entered up against *H.* in *R.*'s name, for 1000 dollars, and that the plaintiff *should assign to *R.* *H.*'s mortgage to the plaintiff, which was accordingly done, the plaintiff warranting to *R.* that the property should produce 1000 dollars.. That the execution was taken out on the judgment, at the instance of the plaintiff, who with *R.* attended the sheriff's sale, and that *R.* bid off the personal property of *H.*, for the purpose of enabling him to fulfil his engagement to *R.* The real estate was purchased by *R.* for 575 dollars. The personal property sold for 465 dollars. The plaintiff requested *R.* to endorse on the execution to the amount of the sale of the personal property, which he refused to do, unless the plaintiff paid or secured to him 330 dollars, and the plaintiff accordingly gave a mortgage to *R.*, to secure that sum, on other property.

A verdict was taken, by consent, for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated, which was submitted to the court without argument.

YATES, J., delivered the opinion of the court. It was decided in *Craig v. Ward*, (9 Johns. Rep. 197.) that the mere possession of a personal chattel, with the consent of the true owner, will not render the chattel liable to the debts or disposition of the reputed owner, unless it appeared that the possession was fraudulent, and for some deceptive purpose, which might be implied from the special circumstances of the case. This decision did not impair the general principle of law, that a continued possession of goods by a vendor is *prima facie* evidence of fraud, as against creditors. In *Farrington v. Smith*, (15 Johns. Rep. 430.) the court applied this general principle to the case of a sale under an execution, and said that there must be evidence to repel the presumption. In the present case, the evidence on which it is sought to repel the presumption, is not satisfactory. It appears that the judgment in favor of *R. Reed*, on which the execution was issued, and under which the articles in question were sold and purchased, was procured by the plaintiff, pursuant to a previous arrangement with *R.*, to whom he was indebted, which could not have been done without some secret understanding between *H.* and *the plaintiff; and his leaving all the articles, except two or three, in the possession of *H.* for more than a year, *without an agreement*, appears surprising, especially such as were not

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absolutely necessary to *H.* in his embarrassed situation. It appears that, of all the property purchased, the plaintiff took away only a cow, a steer, and two wagons; and in lieu of the wagons, he left one which he now claims as his own; and when we see *H.* using part of the hay and corn, selling some of the wood, and converting the avails to his own use, and that no consideration was to be paid for the use of the property, the inference is irresistible that the transaction was fraudulent: and in regard to the wagon left with *H.*, it is equally evident that he must have possessed it as his own, in consequence of the fraudulent understanding between them. The nature of the arrangement between them is apparent on the face of the transaction. It was evidently intended to benefit *H.*, and to defraud the other creditors. We are of opinion, therefore, that the defendant is entitled to judgment. (a)

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BRANDT
v.
KLEIN

Judgment for the defendant.

(a) Vide *Kellogg v. Griffin* ante, 274, and note (a) 277.

BRANDT, *ex dem.* VAN CORTLANDT AND OTHERS, *against* KLEIN.

THIS was an action of ejectment for land in *Hoosick* patent, tried at the *Rensselaer* circuit, in *December*, 1818.

The plaintiff's lessors having deduced a title to the premises from *Jacobus Van Cortlandt*, one of the original patentees, in 1688; the defendant's counsel called on the plaintiff's counsel to produce the will of *James Van Cortlandt*, one of the ancestors of the lessors, and through *whom they derived a title, which he refused to do. The defendant's counsel then handed to him a written notice to produce it. It was objected that the notice was not sufficient, as it was not shown that the will was in *Troy*, (the place of trial.) The defendant's counsel then called on the plaintiff's counsel, as a witness, to prove that the will was in his possession and in court; but the plaintiff's counsel refused to answer the question, alleging that his knowledge as to the existence and situation of the will was derived from what had been entrusted to him as counsel for the lessors of the plaintiff in the cause. The judge ruled that the counsel must answer the question, and he thereupon testified, that the will was in his hands, in court, but refused to produce it. The judge then ruled that parol evidence might be given of its contents. To show

Though an attorney or counsel cannot be compelled to produce a deed or other instrument, entrusted to him by his client, nor to

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disclose its date or contents, yet he may be called as a witness to prove its existence, and that it is in his possession, so as to entitle the opposite party, on his refusing to produce it at the trial, after notice for that purpose, to give parol evidence of its contents.

An admission contained in a recital of a deed of one of the lessors, in an action of

ejectment, is evidence against all of them, as he could not be called as a witness, and there was a community of interest among them.

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the contents of the will, the defendant's counsel offered in evidence a deed, dated *October 1st, 1816*, executed by *Augustus Van Cortlandt*, one of the lessors, as surviving executor of *James Van Cortlandt*, for part of lot No. 43. in *Hoosick* patent, which had been duly acknowledged and proved, and which contained a *recital* of the will of *James Van Cortlandt*, dated the 23d of *March, 1781*. The plaintiff's counsel objected to the admission of the deed in evidence; but the judge overruled the objection, stating that, under the circumstances of the case, the deed and the recitals therein contained ought to go to the jury, as containing the admissions of one of the lessors of the plaintiff, that *James Van Cortlandt*, under whom he claimed, had made a will, and of the contents of that will, and of an outstanding title in *Elizabeth Van Cortlandt*, on the day of the demise laid in the plaintiff's declaration; and by which the other lessors were bound, unless they proved that the recital or admissions were not true in fact; and the counsel for the plaintiff, not attempting to disprove the truth of the recitals or admissions contained in the deed, the judge directed the plaintiff to be nonsuited.

A motion was made to set aside the nonsuit, and for a new trial.

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Mitchell, for the plaintiff. 1. The counsel for the plaintiff *ought not to have been compelled to testify as to the existence or situation of the will of *James Van Cortlandt*. The privilege of a counsel or attorney of not being examined as to any matters communicated to him while engaged in his professional capacity, is the privilege of the client, not of the counsel or attorney. (*Phillips's Law of Ev.* 103.) The judge, in overruling the objection, relied on the case of *Baker v. Arnold*. (1 *Caines's Rep.* 258.) That case, however, if examined, does not warrant the principle stated in the marginal note to the report, and adopted in the *Digest*. (*Johns. Dig.* 215.) *Thompson, J.*, was decidedly of opinion, that the attorney was not bound to communicate any facts, the knowledge of which he had derived from his client in relation to his business. *Livingston, J.*, thought the judge right in overruling the inquiry made of the attorney, after he had declared that all his knowledge was derived from the confidential communications of his client; and though *Radcliff, J.*, was of a different opinion, yet the other two judges, *Kent, J.*, and *Lewis, Ch. J.*, are wholly silent on this point.

2. The deed containing the recitals which were offered, was not competent evidence of the will. It appeared by the endorsement on it, that it was on record, and that the probate was in *New-York*, and being recorded before the 1st of *January, 1781*, an exemplification of it, by the act concerning wills, (1 *N. R. L.* 364. sess. 36. ch. 23. s. 21. 2 *Rev. Stat.* 59. § 20.) was good evidence. (*Jackson, ex dem. Colden, v. Walsh.* 266

14 *Johns. Rep.* 407.) Again; the existence of the will was not shown; nor was there any proof of it, nor of any holding under it. The party must first prove the existence of an instrument, before he is allowed to give parol evidence of its contents. Where there is a subscribing witness to a deed, proof of the confession of the obligor or grantor is not sufficient, but the subscribing witness must be produced; and in case he is dead or out of the state, there must be proof of his handwriting. (4 *Johns. Rep.* 477. 2 *Johns. Rep.* 382. 3 *John. Cas.* 101.)

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3. But if the deed was admissible, it could only prove a title out of *Augustus Van Cortlandt*, not out of the other lessors. Here were joint and several demises; and this *court, in such case, will allow a recovery on the separate demise of one of the lessors.

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Huntington, contra. Though an attorney cannot be compelled to testify relative to the estate, or affairs of his client, yet he is compellable to answer whether there are any deeds, where they are, to whom they were delivered, when he last saw them, and in whose custody they are, though he is not bound to produce the deeds, or to discover the dates or contents of them. (1 *Maddock's Ch.* 174. 1 *Haris Ch. Pr.* 290.) This is the rule in the court of chancery, and in matters of evidence the rules of the courts of law and of equity are the same. In *Baker v. Arnold*, it was decided, that an attorney in a suit may be examined to show the state of the instrument at the time it was put into his hands. The privilege of the client extends only to the attorney giving evidence of the date or contents of the deed.

As to the competency of the evidence; the admissions of a party against his interest are good evidence; and where the suit is against several persons who have a joint interest in the decision, a declaration made by one of them, as to a material fact within his knowledge, is evidence, not only against him, but against all the other parties who are jointly interested with him in the suit. (*Phillips's Law of Ev.* 73, 74. 11 *East*, 589.) So, a release by one of two joint plaintiffs is a bar to the action. (13 *Johns. Rep.* 286. 14 *Johns. Rep.* 172.)

Per Curiam. The case of *Baker and another v. Arnold* (1 *Caines's Rep.* 258.) is not an authority, either way, on the question as to what facts an attorney or counsel may testify, when called on as a witness. The judges appear to have been much divided, and no clear and satisfactory opinion on this point can be collected from the case.

The general rule is, that an attorney is not to be compelled to disclose confidential communications between him and his client, made in the course of his professional business. But as to collateral matters, the knowledge of which the attorney

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has acquired by personal observation, and which were not communicated as a secret, or as to *such collateral facts, which may be material for the other party, and the answer to which does not betray any confidential communication between them, the attorney may be compelled to answer. (a) As where the question is about the rasure in a deed or will, the attorney may be asked, whether he had ever seen such deed or will in other plight; for that is a fact in his own knowledge; though he is not to discover any confessions made by his client on such head. (*Bull. N. P.* 284.) In *Kingston v. Gale*, (*Finch's Rep.* 259. 3 *Viner's Ab.* 548.) where there was a bill for a discovery of a deed and the contents of it, in the custody of the defendant who was attorney, and the defendant demurred to the bill, for that he was an attorney at law, and was intrusted by his client with the deed, the court were of opinion, that there ought to be a discovery whether there was such a deed, where the same then was, to whom delivered, and when the defendant last saw the same, and in whose custody; but that he was not to produce the deed, or discover the date or contents of it. *Maddock* (1 *Madd. Ch.* 174.) cites this case as good law. *Phillips*, in his *Treatise on Evidence*, (p. 103. to 105.) lays down the rule as stated by *Buller*. The court would feel very great reluctance to innovate on a rule of evidence founded in so much good sense and propriety, as that which prevents a disclosure by a person standing in the relation of an attorney or counsellor, from disclosing communications confidentially made to him in his professional capacity; but it does not appear to us, that, to oblige the attorney to answer merely as to the existence of an instrument, or where it is to be found, would infringe that rule. The party himself might, by a bill in chancery for that purpose, be called on to discover whether he has not in his possession a deed or instrument, which is necessary to the other party in the prosecution or defence of his rights. (1 *Madd. Ch.* 160—174.)

The admissions in the recital contained in the deed of one of the lessors, was evidence in the cause against all of them; for he could not be called as a witness, and they have a community of interest. (*Phillips's Ev.* 71, 72, 73. 11 *East*, *588, 589. *Gilb. Ev.* 51. 1 *Maule & Sel.* 249.) The motion for a new trial must be denied.

Motion denied.

(a) *Johnson v. Davenport*, 19 *Johns. Rep.* 134. *Jackson, ex dem. Neilson*, 19 *Johns. Rep.* 330. *Wilson v. Troup*, 2 *Cowen*, 195.

SMITH and MARSHALL *against* ROGERS, *impleaded with*
BEMENT.ALBANY;
January, 1820SMITH
v.
ROGERS.

THIS was an action of assumpsit for goods sold and delivered. The plaintiffs, under the firm of *Smith & Marshall*, in *April*, 1816, sold to the defendants, partners in trade, under the firm of *Rogers & Bement*, a quantity of merchandize. In *April*, 1816, subsequent to the sale, the defendants dissolved their copartnership; and on the 22d of *April*, *Bement* wrote to the plaintiffs, as follows: "Our firm was dissolved on the 3d instant, and I assumed your demand, which you may rest assured will be paid as soon as possible." On the 27th of *April*, the plaintiffs answered, as follows: "We observe your partnership is dissolved, and that you have assumed our debt, which we are satisfied with." On the 19th of *July*, 1816, *Bement* again wrote to the plaintiffs, as follows: "I inclose you 100 dollars, which you will please to place to the credit of the late firm of *R. & B.*" On the 13th of *August*, 1816, *B.* gave his note to the plaintiffs, who gave him the following receipt: "Received, *Albany*, *August* 13, 1816, from Mr. *C. N. Bement*, his note on demand, with interest, for six hundred dollars, when paid to be placed to the credit of *Rogers & Bement's* account with us; also, two dollars and 86 cents, for balance of said account." On the 21st of *December*, 1816, the *plaintiffs received from *B.* 100 dollars in part payment of the above balance. *B.* continued to do business until *November*, 1817, when he became insolvent; no suit was brought against him to compel the payment of the note given by him to the plaintiffs; nor was *R.* called on by the plaintiffs, for the payment of the original debt, until after the insolvency of *B.*

On the 13th of *August*, 1816, the same day that the plaintiffs gave *B.* the receipt for his note, they gave to him a second receipt, as follows; "Received from Mr. *C. N. Bement*, his note at six months, for two hundred and thirty dollars, in full, for invoice of two pipes of wine, shipped by us, and consigned to *Bacon & Bement.*"

On the 21st of *February*, 1817, *G. B. & D. Berdon* gave notice to *C. N. Bement*, that Messrs. *Smith & Marshall* had assigned to them his note for 600 dollars, dated the 12th of *February*, and requesting payment to them. And the present suit was brought, with the consent of the plaintiffs, for the benefit of *B. & B.*, to whom the note was assigned: and the case stated, that the note was in possession of the attorney of the plaintiffs, subject to the order of the court. The cause was submitted to the court without argument.

R. & B., partners in trade, being indebted to the plaintiffs, for goods sold and delivered. *B.* on the 22d of *April*, 1816, informed the plaintiffs, by letter, that they had dissolved their partnership, and that he, *B.*, had assumed the debt due to the plaintiffs, of the payment of which they might rest assured; to which the plaintiffs replied: "We observe your partnership is dissolved, and that you have assumed our debt, which we

[* 341] are satisfied with." *B.* afterwards paid part of the debt, and on the 13th of *August*, 1816, liquidated the account, and gave the plaintiffs his promissory note on demand for the balance due; and the plaintiffs gave him a receipt for the note: "when paid to be placed to the credit of *R. and B's* account with them." *B.* continued in business until *November*, 1817, when he became insolvent, and the plaintiffs, who had not sued *B.*, nor made any demand of

R., brought an action against *R. & B.* on the original contract for goods sold and delivered. *Held*, that neither the acceptance by the plaintiffs of the note of *B.*, nor the indulgence shown to him, amounted to a payment, or discharged *R.*, but that the plaintiffs were entitled to recover the balance due for the original debt, on delivering up the note to be canceled.

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YATES, J., delivered the opinion of the court. The declaration of the plaintiffs, contained in their letter to *C. N. Bement*, of the 27th of *April*, 1816, that they had observed their partnership was dissolved, and that they were perfectly satisfied that he had assumed the payment of their debt, cannot be considered as a discharge of the firm of *R. & B.*, so as to confine the remedy of the plaintiffs to *B.* alone; nor does it appear that it was so understood at the time. The payment of one hundred dollars made on the 13th of *August*, contradicts such a construction. When he sent the money, he requested the plaintiffs to place it to the credit of the late firm of *R. & B.* The receipt given when the note was taken also shows that this was the understanding. This receipt expressly mentions that the note, when paid, is to be placed to the credit of the late firm, evidently retaining the parties who contracted the debt originally, and continuing their liability until the note should be paid off; it was, therefore, the duty of *R.* to see that *B.* complied with the engagement made with him, as to the payment of this debt; and that the plaintiffs, knowing of this arrangement, are not, on that account, to be considered in default, for omitting to call on *R.*, until *B.*'s insolvency. It was the particular duty of *R.* to guard against such an event, by causing the debt to be paid by *B.*, without delay; but there appears to have been no interference on his part; and it is probable that his misplaced confidence in his former partner made him easy on the subject. There certainly can be no reason why the plaintiffs, or those beneficially interested under them, should suffer by his negligence. There must be judgment for the plaintiffs for 586 dollars, the amount of balance due on the note, with interest until this term, on the plaintiff's filing the note given by *C. N. B.* to them with the clerk of this court, to be canceled.

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Where a cause was regularly brought to trial pursuant to the notice, and the jury were discharged, because they could not agree on a verdict, and the judge allowed the cause to be again put on the calendar, for the purpose of being tried by another jury, but the plaintiff's counsel refused to bring on the cause to trial again at that sittings; *Held*, the defendant is not entitled to judgment as in case of nonsuit, for not bringing on the cause to trial pursuant to notice.

THIS cause was tried at the last sittings in *New-York*, before Mr. Justice *Woodworth*. The jury who were impaneled to try the cause, after being out several hours, returned into court, and informed the judge that they had not agreed on their verdict, and that there was no probability that they should ever agree upon it; and they were thereupon discharged by the judge. The counsel for the defendant then applied to the judge to have the cause reinstated on the calendar, in order that it might be tried by another jury; and the judge decided, that

it might be put on the calendar for the purpose of being tried again. The plaintiffs' counsel stated, that they should not, for reasons which they mentioned, try the cause during the sittings; and it was not tried.

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Wells, for the defendant, now moved for judgment, as in *case of nonsuit, for not bringing the cause to trial at the last sittings, pursuant to notice.

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D. B. Ogden, contra.

Per Curiam. Under the circumstances of the case, we do not see that the plaintiffs were bound to have the cause tried by another jury, at the same sittings, or that they can be considered as in default. The motion must be denied.

Motion denied.

FISHER AND OTHERS *against* DALE.

THIS was an action of assumpsit against the defendant, as drawer of two bills of exchange.

Issue was joined in the cause, in *March*, 1818, and commissions were issued to take the examination of witnesses, in *Halifax*, (*N. S.*) *London*, and *Ashby de la Zouche*, in *England*, which were duly executed and returned; and on the trial of the cause, at the last *November* sittings, in *New-York*, the depositions taken under the commissions were read in evidence; but the jury who were impaneled to try the cause, not being able to agree on their verdict, were discharged by the judge.

A motion was now made for leave to issue commissions to take the further examination of some of the witnesses named in the former commissions, and whose depositions were read at the trial.

The affidavit of the attorney, in fact, of the plaintiffs, (who resided abroad,) stated, that great difficulty existed, as the deponent believed, in the minds of the judge and jury, whether the sum of 700 pounds sterling, mentioned in the return of the commission sent to *London*, had been paid on account of the two bills of exchange upon which *the suit was brought; and, also, whether the bills were included in, and intended to be secured by, a note of 10,000 pounds sterling, mentioned in the return to the commission directed to *Ashby de la Zouche*, given to the plaintiffs, as collateral security, and, also, whether the said note had not been paid by the maker thereof. The affidavit further stated, that the jury could not, as the deponent believed, agree in their verdict, by reason of the doubt

Where depositions of witnesses residing abroad, taken under a commission, were read on the trial of a cause, and the jury not being able to agree on their verdict, were discharged, a second commission was issued to re-examine the same witnesses, it being stated, by affidavit, that some of the doubts which existed at the trial, would, probably, be removed by such re-examination.

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and difficulty above-mentioned, and that these doubts would be removed by a further examination of the witnesses named.

The affidavit of the attorney of the defendant stated, that at the trial of the cause, at the last sittings, the plaintiffs produced, and read in evidence, the deposition of *J. B.*, of *Cventry*, in *England*, taken under a commission, by whose testimony it appeared, that *J. B.* was the *maker* of the promissory note for 10,000 pounds, mentioned in the affidavit on the part of the plaintiffs, and which was one of the principal subjects of controversy at the trial of the cause.

D. B. Ogden, for the plaintiffs

Wells, contra, objected, that the affidavit of the plaintiffs' agent did not state that the witnesses proposed to be examined are material, as the act requires; nor that he was advised by counsel: That it did not appear that there was any cause for the doubts suggested as to the testimony, or any intrinsic difficulty concerning it, and the judge, in his charge to the jury, expressed no doubts; that *B.* was the maker of the note, who must have known the consideration for which it was given, and who was examined under the commission, and his deposition read at the trial; yet the plaintiffs do not propose to re-examine this witness, who, of all others, must be presumed capable of giving the best evidence on the subject. The power to issue a commission is derived from the statute; and where a commission has been once duly executed and returned, the power is spent. No irregularity in taking the depositions has been suggested; nor is there any difficulty in regard to the testimony, except that it does not meet the wishes of the plaintiffs. To allow a second commission to issue to re-examine witnesses, *whose depositions have been regularly taken and read, would lead to a practice highly dangerous. It seems to be against the spirit of the act, which does not entrust either of the parties with the testimony, nor permit them to see it, until it is returned into this court. It is not like the examination of a witness, *de bene esse*, before a judge or an officer of the court, amenable to its authority. The commission is executed before persons not within the jurisdiction or control of the court. It would be contrary to the rules of the Court of Chancery, from which the practice of issuing commissions to take depositions is derived. (a) The issuing of commissions rests in the sound discretion of the court. (*Vandervoort v. The Columbian Ins. Co.* 3 Johns. Cas. 137.)

Per Curiam. We see no solid objection to allowing a second commission. The examination of witnesses in the Court of Chancery is private; and the proceedings in that court, in

(a) Vide *Hamersley v. Lambert*, 2 Johns. Ch. Rep. 432. 1 Har. Ch. Pr. 349 Gilb. Ch. 145, 146.

relation to the manner of taking testimony, is so different from that of courts of law, that the reasons on which the practice in Chancery is founded, do not apply here. Suppose a witness has not answered some of the interrogatories, or has answered them in an obscure and unintelligible manner, it may be essential to the purposes of justice, to direct a second examination. If the witness himself should come to this country before the trial, the Court could not refuse to permit his examination, although his deposition had been taken in the cause.

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Rule granted.

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MOTION for leave to issue an *alias capias ad respond.* in this cause, upon filing a *capias ad resp.* therein, returnable as of *August* term, 1818, with a return of *non est inventus* endorsed thereon; or for leave to file a *capias ad resp.* thereon, with a return of *non est inventus* thereon, *nunc pro tunc*; or for such order as the court may think proper to grant.

In the vacation, after *May* term, 1818, a *capias ad resp.* in favor of the plaintiff, who sues as well for the poor of the town of *Springfield*, in *Otsego* county, as for himself, against the defendant, in an action of *debt*, under the *act for preventing usury*, (1 *N. R. L.* 64.) was issued, directed to the sheriff of *Otsego*. The plaintiff's attorney being informed by his agent, that the *capias ad resp.* had been duly served and returned to the clerk's office at *Utica*, proceeded to file his declaration, and delivered a copy thereof, with a notice of a rule to plead, to the agent of the defendant's attorney, who had given a regular notice of appearance. A default was, afterwards, entered for want of a plea; but it being afterwards discovered that the writ was never returned to the clerk's office in *Utica*, but was lost or destroyed, the court, on application for that purpose, at the last *August* term, set aside all the proceedings with costs.

It appeared that the *capias ad resp.* had been actually put into the post-office, enclosed and directed to the sheriff of *Otsego*, but had never come to his hands.

King, for the plaintiff.

Brown, for the defendant.

SPENCER, Ch. J., delivered the opinion of the court.

There is no doubt, that the power of the court extends to allow amendments in actions on penal statutes, as well as in ordinary suits. To grant the amendment now asked *would

The court may allow amendments in actions on penal statutes, as well as in other suits; but where in an action of debt, *qui tam*, under the statute for preventing usury, the writ which had been sued out in due time, and sent by mail to the sheriff of the county, had been lost, or miscarried; and the plaintiff, supposing it to have been served and returned, proceeded to file his declaration, &c., the court refused to allow an *alias capias* to issue, as grounded on a return of *non est inventus* to the former writ, or to allow a *capias* to be issued and filed with a return of *non est inventus* thereon endorsed, *nunc pro tunc*.

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be pushing the doctrine to its utmost limits. The suit is barred, unless the court permit a new writ to be made out and filed as of a distant day, and we incline to think it would be going further to subject the defendant to a penalty, than has yet been done; but there is an insurmountable difficulty, unless the sheriff make a return to the writ, that the defendant was not to be found in his bailiwick. Allowing it to be filed *nunc pro tunc* would be unavailing.

The sheriff cannot make such a return without a palpable violation of the truth; and if he did make it, contrary to the fact, and thereby the defendant sustained a loss, what is there to protect the sheriff from a liability to an action for the damages occasioned by the false return?

Fictions of law were invented, and are allowed in furtherance of justice and to prevent an injury, but it would be going an extraordinary and unwarrantable length, to require an officer to make a false return to remedy an accident to one of the parties. The writ never came to the sheriff's hands; if he had received it, and truly could return that the defendant was not to be found, these facts would justify an amendment, by making out a new writ, and filing it with the sheriff's return, *nunc pro tunc*. As the case is, the motion must be denied.

WOODWORTH, J., dissented. That the court has competent powers to afford the plaintiff relief is, in my view, unquestionable. We are called upon to direct that a *capias* be issued, *nunc pro tunc*, as of May vacation, 1818, returnable as of August term following. It is within the ordinary powers of the court to allow a new writ to be made out and delivered to the sheriff, where the former has been lost or destroyed. (*White v. Lovejoy*, 3 Johns. Rep. 448.) Whether the writ had actually been received by the sheriff, or been issued and lost, on its passage to the sheriff's office, cannot, I apprehend, make any difference; because the time of taking out the first process, for every material purpose, is to be considered as the actual commencement of the suit. (*Carpenter v. Butterfield*, 3 Johns. Cas. 145. *Fowler v. Sharp*, 15 Johns. Rep. 323.) But it is objected, that the court cannot rightfully *direct the sheriff to return *non est inventus*, on the new writ, issued for the purpose of continuing the proceedings; and that, should the sheriff obey the order, he would be liable to an action for a false return. In answer to this objection, it must be remembered, that, with regard to legal fictions, it is a general maxim, that *in fictione juris subsistit æquitas*; wherever it may contribute to the advancement of justice, the fiction is maintained; but is never allowed to work an injury or prejudice to any party. For the attainment of substantial justice, and to prevent the failure of right, the court frequently apply this maxim; and the acts done by the officers of the court, (of which the sheriff is one,) in pursuance of their legitimate authority, could

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never render the officer liable. If the new writ may be considered as having been in the sheriff's hands, no injury is done to the defendant by such presumption, for I have already shown, that the suit was well commenced from the time of taking out the writ: the sheriff's return of *non est*, would be justified by the order of the court, to advance the remedy, and not fall within the description of acts which subject an officer to damages for a false return. What appears to me conclusive is, that it violates no right of the defendant, but subserves the justice of the case, as respects the plaintiff. In an action for a false return, the plaintiff must prove the existence of his debt or actual damages sustained; but how could *Little* support either? He never has been arrested; his complaint would be that the sheriff had returned that he was not found, and that, in consequence of such return, not that he had sustained damages, for, from the nature of the case, none could arise, but that the court, by exercising its legal discretion in support of right, had permitted the plaintiff to continue a suit commenced in good faith. That such a statement would not sustain an action for a false return against the sheriff, I think undeniable.

If, then, the court are vested with a discretion, the question is, Has not the plaintiff presented a case requiring its interposition? The plaintiff having declared and entered a default, under a belief that his proceedings were regular, and those proceedings having been set aside in *August* term last, he is reduced to the necessity of abandoning his action *altogether, as the statute of limitations had then attached, unless the court, by the exercise of its equitable jurisdiction, gives effect to the writ first sued out. In bringing the question before the court, there has been no laches or unreasonable delay, for the application, on which we are to decide, was made at the last *October* term. The plaintiff then having availed himself of the earliest day to obtain relief, and the court possessing ample powers to grant it, I do not perceive any well founded objection to exercising them; unless there is something in the nature of the action that forbids our interposition. The action is to recover a penalty for a violation of the statute against usury; and as to the power of the court, it extends to amendment in penal actions as well as others. In *Maddock, qui tam. v. Hammet and others*, (7 Term Rep. 55.) a rule was obtained to show cause why the declaration, which was in action for usury, should not be amended by altering the times of payment of certain notes, in which the usury was charged to consist; it being admitted, that the statute of limitations had run, so that no new action could be commenced. Lord *Kenyon*, who delivered the opinion of the court, lays down this doctrine, to which I have found no case opposed, that the court will grant leave to amend in penal actions, even after the time limited for bringing a new action, provided the plaintiff has not been guilty of any unnecessary delay in prosecuting his suit, and the

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amendment prayed for does not introduce any new substantive cause of action. The present case is within the principle of that decision.

I am, therefore, of opinion, that the motion of the plaintiff ought to be granted.

Motion denied. (a)

(a) *Brown v. Alpin*, 1 Cowen, 203. *United States v. Hanford & Ely*, 19 Johns. Rep. 173. *Raymond v. Hinman*, 4 Cowen, 41. *Miller v. Gregory*, Ibid. 504. *Chandler v. Brecknell*, Ibid. 49. *The Commission Co. v. Russ*, 8 Cowen, 122. *Thomas, Administrator, v. Van Ness*, 6 Cowen, 588.

END OF JANUARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

IN MARCH, 1819.

HERMAN H. BOGERT, *appellant,*
against

SAMUEL PERRY, ASA SMITH; & JOHN VAN TUYL,
respondents.

APPEAL from the Court of Chancery. *John Atkinson*, being seised in fee of lot No. 98, in the township of *Junius*, on the 4th of *June*, 1804, by a written contract, agreed to sell to *Lewis Birdsall*, parts of the lot, or about 296 acres, at four dollars per acre; 400 dollars, part of the purchase money, to be paid down, and the residue in three annual instalments; a deed to be given to the purchaser, on payment of the second instalment, and a mortgage to be given by him to secure the residue of the purchase money. *Birdsall* paid *A.* the 400 dollars, and went into immediate possession of the land, and afterwards paid *A.* 172 dollars. He neglected to pay the residue, and after about two years, he contracted *to sell the land to *Smith*, one of the respondents. *S.* agreed to pay the balance due upon the contract to *A.*; and *S.*, thereupon,

A mere chose in action cannot be taken and sold on execution.

The 4th section of the statute of *Uses*, (sess. 10. ch. 37. 1 N. R. L. 72. 1 Rev. Stat. 727. § 47.) rendering lands liable to execution against the *cestui que use*, or

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cestui que trust, applies only to those fraudulent or covenous trusts, in which the mere

the *cestui que use*, or *cestui que trust*, has the whole beneficial interest in the land, and the trustee the mere naked or formal legal title.

It is not applicable to a case where one person enters into a contract for the sale and conveyance of land to another, and the vendee pays part of the consideration, and enters into possession of the land, but neglects to pay the residue of the purchase money; for the vendor is not seised to the use of until the whole consideration is paid, and the vendee has only a mere equitable interest, on which the law is not a lien, nor can it be sold under an execution.

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entered into possession of the land, erected a dwelling-house thereon, and made other large and valuable improvements. On the 19th of *October*, 1818, a judgment was docketed in the Supreme Court, in favor of *R. Harison*, for 450 dollars debt, against *Smith*. In *April* or *May*, 1809, *Smith* contracted to sell 200 acres of the land to the respondent *Perry*, for above 2,000 dollars, who agreed to pay the balance due to *A.*, and to pay the residue to *S.*, when all judgments against the premises are settled; and gave his note to *Smith* for 885 dollars, payable accordingly. The bill charged that *Perry*, when he so purchased of *Smith*, had full knowledge of *Harison's* judgment. But *P.*, in his answer, denied that he had any knowledge of it until after he purchased of *Smith*, and entered in possession of the land; but the allegation in the bill appears to have been supported by two witnesses. Soon after this purchase, *Perry* purchased of *Birdsall* his contract with *A.*, which had become forfeited, and surrendered it up to *A.* on the 28th of *May*, 1809. In *July* following, *P.* having paid *A.* 1,050 dollars, the balance due on the contract, received from him a conveyance in fee for the 296 acres of land, the legal title having remained in *A.* until this conveyance.

On the 25th of *October*, 1808, a *test fi. fa.* was issued on *H.'s* judgment against the property of *Smith*; and *Birdsall*, who was then sheriff of *Seneca*, sold the 200 acres at public auction, to the plaintiff, *Bogert*, the highest bidder, for 30 dollars, and executed a deed to him, under the judgment and execution, on the 1st of *August*, 1809. On the 18th of *September* following, the plaintiff tendered to *P.* 1,063 dollars and 40 cents, in full of the money *P.* had paid to *A.*, and demanded a deed from him.

On the 9th of *May*, 1811, *Perry* sold to the respondent *Van Tuyl* the whole 300 acres, for 5,000 dollars, of which 1,000 dollars was paid down, and the residue made payable in future instalments. The bill alleged that *Van Tuyl* purchased with full knowledge of all the facts above stated; but this was denied by him, in his answer, and there was no proof of the allegation. On the 26th of *July*, 1811, the *plaintiff tendered to *Van Tuyl*, 1,215 dollars, and demanded a deed for the 200 acres, which was refused.

The chancellor, in *June*, 1814, being of opinion that the plaintiff was not entitled to call on the defendant, *Perry*, to account for the amount of the sale to *Van Tuyl*, dismissed the bill with costs.

For the reasons of the decree, which were assigned by the chancellor. vide 1 *Johns. Ch. Rep.* 52. 57.

E. Williams and *Henry*, for the appellant. They cited *Sand. on Uses*, 188, 189, 190. 192. 2 *Vernon*, 585. 1 *Johns. Ch. Rep.* 46. 2 *P. Wms.* 736. 1 *Eq. Cas. Abr.* 384. 1 *P. Wms.* 278. 1 *Caines's Cas. in Error*, 47. 50, 51. 53. 57.

65, 66. 10 *Johns. Rep.* 223. 293. 3 *Johns. Rep.* 216. 1 *N. R. L.* 74. 1 *Rev. Stat.* 727. 500. 2 *Powel on Mort.* 615, 616. *Stat. Rich.* III. and 29 *Car.* 2. 1 *Bro. C. C.* 331. 2 *Bac. Abr.* 350. *Ex. (C. 2.)* 13 *Edw.* I. 4 *Com. Dig.* 132 *Execution, (C. 14.)* 2 *Atk.* 107. 1 *Vesey, Jun.* 434. *Sugd. Vend.* 120, 121. 2 *Fonb. Eq.* 143, and notes. *Sugd. Vend.* 484. 1 *Atk.* 384. 2 *Atk.* 630. 3 *P. Wms.* 307.

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Van Vechten, for the respondents, cited *Sanders on Uses*, 168. *Shep. Touchst.* 505. 1 *Fonbl. Eq. B.* 1. ch. 5. s. 7. n. 6. 2 *Fonbl. B.* 2. ch. 2. p. 29. n. 3. s. 2. 2 *Bro. Ch. Cas.* 337. 5 *Johns. Rep.* 345. 8 *East Rep.* 467. 4 *Dow's Rep.* 230. 504. 4 *Johns. Rep.* 42. 7 *Johns. Rep.* 292.

SPENCER, Ch. J. The single question in this case is, whether *Smith* had such an interest in the land contracted for with *Birdsall*, and which the latter had contracted for with *Atkinson*, as was liable to be sold on execution, or as was bound by the judgment in favor of *Harison*? If he had not, then there is an end of all the other points raised by the appellant; for his right to relief depends entirely upon the legal effect of *Harison's* judgment on the interest which *Smith* had in these lands. It is well settled, that a mere chose in action cannot be levied on and sold by execution. (4 *Johns. Rep.* 96. 9 *Johns. Rep.* 42.)

*It is true, that since the statute of 27 *Hen.* 8. ch. 10. the *cestui que use* is the real owner of the estate, and his interest is bound by a judgment, and may be sold on execution; and our statute concerning uses, (1 *N. R. L.* 72. 1 *Rev. Stat.* 727. § 47.) contains the provisions of the *British* statutes of 19 *Hen.* 7. ch. 15. 27 *Hen.* 8. ch. 10. and 29 *Car.* 2. ch. 3. sec. 10. But it is insisted, that the fourth section of our statute concerning uses, authorizes the sale which took place under *Harison's* judgment and execution, and that the appellant, as the purchaser, became vested with all the rights of *Smith* as a *cestui que trust* in the lands articted for with *Atkinson*.

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This section provides, "that the sheriff, upon any writ or precept upon any judgment, may do, make, and deliver execution unto the party suing, of all such lands, &c., as any other person is seized or possessed, to the use, or in trust for him, against whom execution is so sued, like as the sheriff might if the party against whom execution shall be so sued had been seised of such lands, of such estate as he is seised of, in the use or trust at the time of the execution sued; and such lands, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged of all incumbrances of such persons as are so seised and possessed, to the use, or in trust, for the person against whom such execution is sued." This is the substance of the section. It is very certain, that it does

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not apply to this case; for *Atkinson* never was seised to the use, or in trust, either of *Birdsall* or *Smith*. The statute intended to subject to execution the real estate or hereditaments of a person having the entire interest therein, but which was nominally and formally vested in another person. If *Atkinson* is to be considered as seised, in the first instance, in trust for *Birdsall*, and after the contract between *Birdsall* and *Smith*, for the latter, then the appellant would, by force of the statute, hold the land purchased on execution, freed and discharged from the incumbrance of *Atkinson's* claim for the consideration money of the purchase by *Birdsall*. And in such case, *Atkinson* would be divested of that portion of the consideration which remained unpaid. This construction of the statute, it is evident, would produce most mischievous consequences, as regards every person who should contract to sell real estate, and receive any portion of the consideration money. The vendor does not become seised to the use or in trust for the vendee, until the whole consideration money is paid; he retains the title to the estate, and the use in it, to himself, until he has completely satisfied the consideration; and it is one of the requisites to the execution of a use under the statute, that the estate out of which the use arises, should vest in the *cestui que use*. (2 *Fonb. B.* 2. ch. 6. sec. 1. and *Sand. on Uses*, 168.) Here it could not vest in any other person, until *Atkinson* was fully paid and satisfied, and this did not happen until after the sale to the appellant, on the execution on *Harison's* judgment.

The idea thrown out, on the argument, that the estate did vest in *Birdsall*, and, afterwards, in *Smith*, as far as the consideration money paid, and that it remained in *Atkinson*, in regard to that part of it which was unpaid, is a novelty in the law, without any authority or reason for its support. It supposes a community in the use, partly in the vendor and partly in the vendee, in proportion to their interests in the estate. It cannot admit of a doubt, that the statute embraces those cases only, where the entire estate, out of which the use arises, vests in the *cestui que use*, in consequence of his having paid the whole consideration money; and I have met with no case or *dictum* countenancing the doctrine of a divided use, vested in the vendor and vendee. We have been referred to *Sugden*, 120. for the principle, that equity looks upon things agreed to be done, as done; and that when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser, and the purchaser as a trustee for the purchase money, for the vendor. This, however, is merely so for the purpose of affording the requisite remedy upon contracts, and the doctrine has no connection with, or relation to, the statute of uses. It is an artificial rule adopted in equity to coerce parties to the fulfilment of their contracts.

I fully accede to the proposition laid down by the chancellor, that the fourth section of our statute of uses, was taken from

a branch of the *English* statute of frauds, and relates to those fraudulent and covenous trusts in which the **cestui que use* has the whole beneficial interest, and the trustee the naked and formal title. It undoubtedly extends, also, to a transaction which was not originally fraudulent, as where the trustee had at first an interest in the estate, but which, subsequently, became extinct, and the whole estate vested in the *cestui que trust*. Had *Smith*, as the assignee of the contract with *Birdsall*, paid *Atkinson* the whole consideration money, the statute would have applied, for then *Atkinson's* retaining the legal estate, would, as regarded creditors, have been fraudulent; *Smith* never having paid *Atkinson* the money due him, had but a mere equity in the lands, which could not be reached by execution. I am, therefore, of opinion, that the decree of the Court of Chancery ought to be affirmed.

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This being the unanimous opinion of the court, it was there-upon ORDERED, ADJUDGED, and DECREED, that the decree of the Court of Chancery be affirmed, and the appeal be dismissed; and further, that the appellant pay to the respondents one hundred dollars, together with their costs to be taxed, for their damages and costs, in defending the appeal; and that the record be remitted, &c.

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Decree of affirmance. (a)

(a) Vide *Jackson*, ex dem. *Stone*, v. *Scott*, 18 *Johns. Rep.* 94. A person in the possession of land, under a contract for the purchase and sale of it, has an interest in the land which may be sold on execution. The defendant in such case becomes *quasi* tenant to the purchaser, and cannot object that he has no title. *Ingalls* v. *Lord*, 1 *Cowen*, 240. *Jackson*, ex dem. *Cary*, v. *Parker*, 9 *Cowen*, 85. *Jackson*, ex dem. *Ten Eyck*, v. *Walker*, 4 *Wendell's Rep.* 462.

IN ERROR

ALBANY,
March, 1819.SKINNER
v.
WHITE.*REUBEN SKINNER, *appellant*,
*against*JOHN WHITE and MARVIN WHITE, who are impleaded with RANDOLPH TAYLOR, ABRAHAM DAYTON, REUBEN WHEELER, WILLIAM RAYMOND, JUN., NATHAN H. RAYMOND, ABNER P. HITCHCOCK, and NATHAN DOANE, *respondents*.

Where an executory contract has been entered into, so as to become binding on the parties, both parties have acquired such an interest in its execution, that neither of them can divest the other of his right to have the contract fulfilled. And if one of the parties refuse to proceed further, [* 358]

so that the other is disabled from performing his part of the contract, it is a violation of the contract, for which the party may have his action to recover damages against the one who has been the cause of the non-execution of the contract.

A court of equity relieves against penalties and forfeitures where the case admits of a certain compensation.

A. covenanted with B., in April, 1815, to make certain machinery, in one year, at a certain price, to be paid in instalments: on the 1st of August following, B. gave notice to A. that he could not go on, and that the contract was abandoned: and A. (the covenants being independent) brought an action at law against B. to recover the instalments due before the 1st of August, he having abandoned the work, because of the inability of B. to pay the sums according to the agreement.

Held, that on B.'s confessing judgment in the suit at law, with leave to A. to enter it up, that the injunction which had been issued by the Court of Chancery should be continued until the hearing, and that proceedings be had in that court, either by a reference to a master, or by an issue at law, to ascertain the damages sustained by A., by the non-execution or rescinding of the contract: the answer of A. to the bill of B., alleging that the instalments due on the 1st of August, and sued for at law, did not exceed a just compensation for their damages in prosecuting the work to the 1st of August, and in the loss of their profits on the work, not being sufficient to rebut the equity on which B. relies for relief, by having on a judicial inquiry into the facts, the damages ascertained by a master, or on an issue of *quantum damnicatus*.

Where an answer to an injunction bill denies all the circumstances upon which the equity of the bill is founded, on a motion for dissolving or reviving the injunction, credit is given to the answer

them,) to wit, six frames, in the month of *October* then next, and six other frames, on or before the 1st of *May*, 1816, and the appellant and *W. R.* and *A. P. H.* in behalf of the company, engaged to pay *White*, *Taylor*, and *White*, 15 dollars for each spindle, or 15,120 dollars, as follows, to wit, 900 dollars in 35 days, and 500 dollars in every 30 days thereafter, until all the machinery is in full operation, at which time the balance due *W.*, *T.* and *W.* was to be paid.

The president and directors had raised, by assessments, about 1100 dollars; and on the 27th of *April*, 1815, they laid another assessment on 18 shares, of 50 dollars each. *A. D.*, *J. H.* and *R. W.* paid their assessments, amounting to 350 dollars, but all the other associates refused to pay their assessments, and suffered their shares, with all previous payments, to become forfeited. The president and directors, within thirty days thereafter, gave notice, in writing, to *W.*, *T.* and *W.*, that, by reason of the forfeiture of these shares, the company would not go on with their factory, and that the contract made with them could not be performed on the part of the president and directors. *N. H. R.*, who delivered this notice to *W.*, *T.* and *W.*, was answered, as the bill stated, but which was denied in the answer, that they had made no contract for machinery, but had done something toward the frames.

The bill further stated, that since the forfeiture of the shares, the appellant had, out of his own funds, paid 217 dollars *and 94 cents, which had not been reimbursed; that the company had become insolvent; that one of the associates had absconded, another was imprisoned for debt, and the partnership had been dissolved, and its debts were to be settled by *M. White*. That in *August*, 1815, *W.*, *T.* and *W.* brought an action in the Supreme Court, against the appellant, for a breach of covenant contained in the above agreement; and the plaintiffs, in their declaration, alleged breaches in the non-payment of 900 dollars within 35 days, 500 dollars on the 29th of *June*, and 500 dollars on the 9th of *July*, 1815. That the appellant pleaded, that the agreement was executed by him and the two directors, in their capacity of directors and agents of the company, and not otherwise; and that on a demurrer to this plea, the Supreme Court gave judgment against the appellant. (a) That the appellant gave notice to the other partners of the suit, but they declined doing any thing, and that *Ira Hall* had since died intestate. The bill prayed, that the defendants might be decreed to repay the appellant the 217 dollars and 94 cents; that the agreement might be delivered up to be canceled, and an injunction issued to stay all further proceedings at law, and for relief generally.

M. and *J. W.*, in their answers, admitted the execution of the agreement, but denied that they agreed or expected to

(a) Vide 13 Johns. Rep. 307. *Skinner v. Dayton*, 19 Johns. Rep. 513. 5 Johns. Ch. Rep. 351

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look to the company for the performance, but relied on the liability and responsibility of the appellant. That they received the letter or notice of *May*, 1815, &c. That immediately after the contract, they commenced the work on the machinery, and continued it until the 1st of *August*, 1815, when they received a letter from the plaintiff, which convinced them that he did not mean to perform the contract, and which they considered as amounting to a notice of an abandonment of it, and a refusal to perform it. That the work and materials furnished, at the expense of 3,300 dollars, had become useless, and not worth 400 dollars, &c.

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The chancellor, after hearing the cause, on the 28th of *August*, 1817, ordered the injunction, staying the proceedings *at law, to be dissolved. From this decretal order the plaintiff appealed.

The *chancellor* assigned his reasons: (See 2 *Johns. Ch. Rep.* 526. 537.)

Henry, for the appellant.

Buel and *Van Vechten*, for the respondents, *M.* and *J. White*.

For the appellant, it was contended, that being wholly remediless at law, he was, therefore, entitled to relief in equity. The contract on the part of *W., T. & W.* not having been executed, and the covenants to do the work, and to pay the price, being independent, there is nothing at law to prevent the recovery of the whole price, even if the work had been altogether undone. Unless a court of equity, therefore, can interpose, this most manifest injustice would be the consequence, that payment of the whole price may be exacted, without any equivalent. The jurisdiction of the Court of Chancery to afford relief where the work is entirely done, is indisputable; and it is equally so, where the work has been only in part performed. The covenants being independent, each party is bound to performance, and *W., T. and W.* might have proceeded and finished the machinery, notwithstanding any notice of the intentions of the other party, and they would, then, have been entitled to the whole price. But having, themselves, voluntarily stopped short in the execution of the work, natural justice can demand no more than that they should be indemnified for what has been actually done.

As an indemnity is all that can be equitably demanded, and the extent of that indemnity is not only uncertain. but disputed; the parties in interest ought not to decide upon it for themselves; but it should be ascertained either by a jury, on an issue of *quantum damnificatus*, or by a master, on a reference to him for that purpose.

Again; though this may not, literally speaking, be a case of

forfeiture, yet, if it is to be regarded in a strict legal point of view, as authorizing the exaction of the whole price, *without any possibility of mitigation, it is, in spirit and effect, a forfeiture of the hardest and worst kind. For, if the principles on which the injunction was dissolved are sound, the respondents might sue for further instalments, and, in answer to any bill for relief, allege that the damages they had sustained exceeded the amount demanded, and thus their avarice be the only limit to their exactions.

A court of equity, as to its power of giving relief, is not confined to cases of strict forfeiture or penalties only; but it has interfered and relieved when the breach of an agreement is not wilful or fraudulent, where compensation can be made; and especially in a case of this kind, in which the insisting on the literal fulfilment of the contract would be, in the highest degree, unjust and fraudulent. (1 *Madd. Ch. Tr.* 29. *Eaton v. Lyon*, 3 *Vesey*, Jun. 690. 693.) There are numerous cases to be found in which equity controls contracts, contrary to the letter of them, and affords relief, though there is no forfeiture or penalty. (*Newland on Cont.* 251. *Ambler*, 331. 4 *Com. Dig.* 406. *Cond.* 2. *Q.* 1. 4 *Bro. Ch.* 415. 2 *Johns. Rep.* 614. 3 *P. Wms.* 307.)

Again; the instalments agreed to be paid, being a part of the price of the machinery, cannot be deemed in the nature of stipulated damages; besides, the respondents themselves, by claiming damages far beyond the instalments, do not allow such a construction. But even if the instalments were to be deemed stipulated damages, there is the same necessity for an apportionment of them according to the work performed, or injury sustained; and which must be done by a jury, or on reference to a master.

It may be said, that if a suit should be brought for further instalments, the case might present a different aspect, so as to entitle the appellant to relief. But it is against the general policy of the law, to put parties in a situation which must lead to further litigation, when the whole subject of controversy can as well be determined now, and perfect justice be done to the respondents. The bill contains a prayer for general relief. The dissolution of the injunction is general and unqualified; and not only throws open the door to future litigation, but the acknowledged insolvency of the respondents puts it in their power to recover, and receive *their whole demand at law. It is equivalent to a dismissal of the appellant's bill, who, if he should disprove the answers of the respondents, consisting of matters in avoidance, which they are bound to establish, would not be able to get back his money, and can, therefore, have no inducement to prosecute his suit further.

For the respondents, it was argued, that the appellant, having asked for specific relief, could not have relief generally.

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The non-performance of the contract in this case was owing to the failure of the appellant to pay the money according to his agreement. The respondents had commenced their work in good faith, and were compelled to stop for want of the stipulated advances. The answers are conclusive on the subject. On the question as to continuing or dissolving an injunction, full credit is to be given to the answer; and if the equity of the bill is denied, the injunction must be dissolved. (2 *Madd. Ch.* 285. 1 *Johns. Ch. Rep.* 444.) If, then, the failure to perform the work has been occasioned by the default of the appellant himself, he cannot set up the non-performance as a defence. (3 *Johns. Rep.* 531. *Doug.* 674. 1 *Fonbl.* 391. B. 1. ch. 6. sec. 2. note C.) There is nothing unreasonable in these covenants, requiring advances to aid the party who is to perform the work. (*Cunningham v. Morrell*, 10 *Johns. Rep.* 203.) The respondents claim nothing more than what was due to them for what they had done, when they were compelled to stop. They went on faithfully until *August*, and what they claim in their suit at law, is only for the instalments due on the 1st of *August*, or 1,900 dollars, which is not a compensation for what they had done; the wages of the workmen employed, and the materials purchased, amounted to above 3,000 dollars. There is no force, then, in the argument of the appellant's counsel, that the whole price may be exacted.

Courts of equity do not interpose by an injunction to restrain proceedings at law, unless to prevent manifest wrong and injustice, as in cases of forfeiture and penalties. It is a power which that court exercises with great caution, and *only in cases where it becomes indispensable to protect a party against fraud, accident, or mistake. (1 *Madd. Ch.* 31. 109. 111. 12 *Vesey*, 289. 16 *Vesey*, 406.)

Again; the appellant did not enter into this contract as a mere *agent*. He had no authority to bind the company. If he is not liable to the respondents, no person can be made responsible. The Supreme Court have so decided. (13 *Johns Rep.* 307. 2 *Caines*, 254. 5 *East*, 148. 1 *Fonb.* B. 1. ch 4. sec. 17. p. 292, 293—296.)

Again; the respondents only claim compensation for what they had done before they stopped the work. The instalments are in the nature of stipulated damages. (1 *Madd. Ch.* 33. *Newland on Contracts*, 312. 316. 2 *Bos. & Pull.* 353.) The court is not bound to make a new contract for the parties. (1 *Madd.* 30. 1 *Burr.* 2228.) It is not a case admitting of adequate compensation; the injury resulting to the respondents is uncertain. (12 *Vesey*, Jun. 287. *Ambler*, 322. 1 *Madd.* 27.) Unless the instalments due exceed a fair compensation, they do not amount to a penalty. Equity does not rescind a contract, unless the party who has performed part can be placed in *statu quo*. (1 *Fonb. Eq.* ch. 6. s. 3. 385. s. 1. s. 2, 3. s. 4. *Hare v. Groves*, 3 *Anst. Rep.* 687.)

SPENCER, Ch. J. This appeal is from an order of the Court of Chancery, dissolving the injunction staying proceedings at law upon a contract. It appears that a suit at law was brought on this contract against the appellant for three instalments, amounting to 1,900 dollars, and the Supreme Court decided, that the appellant was responsible at law on the covenants contained in the agreement; and the object of the bill, so far as relates to the present question, is for relief, with regard to the damages claimed by the appellant.

The answer admits, that about the first of *August*, 1815, the respondents received a letter from the appellant, couched in such terms as conviaced them that the appellant did not intend to perform the agreement on his part, and that, thereupon, the completion and all further proceeding in making the machinery were abandoned by the respondents.

*The answer proceeds to state the number of hands employed by the respondents, the great expenses incurred, and the profits which would have been made, had the work gone on, and had the appellant fulfilled his part of the agreement; and if these facts are to be regarded on this occasion, as conclusively true, then, beyond all doubt, the amount claimed in the suit at law would not have exceeded a fair indemnity to the respondents.

I entirely agree with the chancellor, that the appellant's covenant to pay the instalments, was an independent one; and I am equally clear, that, after an executory contract has been entered into, so as to become binding on the parties, both parties have acquired such an interest in its execution, that neither of them separately can divest the other of his right to have the contract fulfilled; and if either of the parties stop short in the execution of the contract, and refuse to proceed any further, so that the other party is disabled from performing his part of the contract, it is violated, and an action lies to recover damages against the party who has been the cause of its non-execution. After the notice given by the appellant, that payment would not be made according to the agreement, and that the company would not go on with their factory, the respondents had their election either to proceed and complete the machinery, or to consider the contract rescinded, and to stop short in their work. They elected, however, at the time already mentioned, fully and finally to suspend their work, so that, thereafter, all idea was abandoned, that the machinery would be made, or that the factory would be built.

It cannot be doubted, that when the contract was entered into, both parties intended its entire and faithful fulfilment. The payments were to precede the completion of the machinery, as a means of enabling the respondents to fulfil their stipulations; and, consequently, they had a right to demand and enforce the payment of that part of the price of the work and materials, which was agreed to be paid before the completion of the whole, without reference to the progress of the work.

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But after the month of *August*, 1815, the contract must be considered as rescinded and abrogated, by the mutual agreement of the parties; for the one *party says, we cannot pay the instalments and do not intend to build the factory; and the others say, then we abandon the work, and actually do abandon it.

It appears to me, that from this period, the contract assumed a new aspect; the respondents could no longer insist on the stipulated payments as due them, and could avail themselves no further of the contract, than as a means of recovering the damages actually sustained by a refusal on the part of the appellant to fulfil his part. In the view of a court of equity, the payments agreed to be made assumed the character of penalties, and ceased to form any criterion to regulate the amount of the damages. The payments being the estimated value of the machinery when completed, and in full operation, when it was ascertained that the machinery was never to be completed. how can it be that the appellant was to pay according to an established standard, when that standard no longer existed?

It would be highly inequitable to allow the respondents to recover on these covenants, as independent ones, when they admit that they never intend to entitle themselves to be paid, and never mean to fulfil their part of the contract; and the respondents ought not to insist on more than a just equivalent for their labor, materials, and loss of profit, which can readily be ascertained by an issue, or by reference to a master.

There can be no doubt of the jurisdiction of a court of equity, to relieve against forfeitures, under such circumstances. If I am incorrect in the positions thus far, I perceive no possible relief for the appellant, against a recovery at law for all the stipulated payments, to the amount of 15,120 dollars, and the interest thereon. And if the argument applies to any of the stipulated payments, it applies to all of them.

The remaining question is, whether the appellant's equity, arising out of the facts I have stated, to be relieved, on compensating the respondents for the damages actually sustained, is rebutted by the facts disclosed in the answer, which show that the damages sustained are equal to the instalments claimed in the action at law. I am of opinion, that the answer does not deprive the appellant of his *equity to have the damages legally ascertained. It is a general and well settled principle, that if the answer denies all the circumstances upon which the equity of the bill is founded, the universal practice is, as to the purpose of dissolving or not reviving the injunction, to give credit to the answer. (2 *Mad. Ch.* 285.)

The answer does not deny the circumstances upon which the equity of the appellant's case is founded, but, on the contrary, admits them. The equity is, that the contract has been rescinded, that the respondents are suing at law to recover sums of money agreed to be paid as the price of certain works which

were to be finished, and that the respondents have abandoned the work, and do not intend to finish it, in consequence of the appellant's inability to pay the sums agreed to be paid. These circumstances are admitted, and the respondents set up, in avoidance of this equity, that their damages in prosecuting the work as far as they did, and in the loss of contemplated profits, is equal to the instalments sued for at law; and thus they set up their opinions, and circumstances irrelative to the equity on which the appellant relies, to deprive him of all relief, by a judicial examination into the facts.

I am not aware that the principle I adopt will operate injuriously to the respondents. The Court of Chancery will take care that they be fully remunerated for all the damages and losses they have sustained; and although it would be hazardous to lay down any general rule as to the damages, I must say, that I should consider the profits which might have been made, as a legitimate head of damages.

The appellant cannot avail himself of that part of his bill which seeks for contribution as against the respondents, for they are in no sense liable to it, for the reasons expressed by the chancellor. My conclusion is, that the order dissolving the injunction be reversed, and that the injunction be continued, on the appellant's confessing judgment in the suit at law, with leave to the respondents to enter it up; and that proceedings be had, by reference to a master, or an issue at law, to ascertain the damages sustained by the respondents, by the rescinding of the contract.

*YATES, J. The important and material facts set forth in the bill, upon which the appellant's equity is founded, are not denied in the answer. On the contrary, it is admitted, that the contract was rescinded on the first of *August*, 1815; but the respondents state, that the amount of damages for which the appellant is liable, far exceed the instalments sued for, so that the question presented is, whether, under the circumstances disclosed by the bill and answer, he is entitled to relief; for, if he is so entitled, then the injunction ought to have been continued or modified.

If the facts and circumstances constituting the appellant's equity, as stated in the bill, had been denied by the respondents, the dissolution of the injunction would have been correct and proper; but the mere estimate in the answer of the respondents, that the damages sustained exceed the amount of the instalments claimed, clearly showing matter in avoidance, which they are bound to establish, and which the appellant might disprove, I am inclined to think, was not sufficient ground to dissolve the injunction; the inquiry, then, must be pursued, whether, from the bill and answer before us, the appellant is entitled to the relief sought for.

The chancellor's reasoning is conclusive in my mind, that

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White, Taylor & White, as parties to the association, were not bound to contribute rateably to all losses and charges. They did, to be sure, agree to take two shares of the company stock, at the time the covenant was entered into with the appellant; but it was on condition, that they were to be exempted from any assessment which had or should be made, until the machinery was furnished, and the manufactory in operation. This never took place. The case, therefore, never occurred, when they could be called upon for any assessment.

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It is clear, that the covenant of the appellant to pay the three instalments, for which the action at law was commenced, is an independent covenant, which he was held at law to perform; and if the respondents had proceeded in the prosecution of the work, and performance of the contract, on their part, equity could not have interposed to prevent a recovery of the whole amount to be paid; because it is not *in the power of one party alone to rescind the contract; but as such performance cannot be pretended, and although the respondents cannot be blamed in desisting, in safety to themselves, from proceeding in it, yet the contract must be deemed to have been rescinded by mutual assent, which places the rights of the parties under it on different grounds.

There can be no doubt, if the work on the machinery had never been commenced, and nothing done under the contract, that on an attempt at law to recover the instalments, a court of equity would have afforded relief; and I can see no reason why the appellant is not entitled to relief, where the contract has been partially performed, especially where so inconsiderable a part of the work had been done at the time of rescinding. It does not destroy the appellant's claim to relief, to say, that the contract would have been fulfilled, if the instalments had been regularly paid, because the failure of payment was inevitable, and not under the control of the appellant; the source from whence the payments were to have been derived, was known to both parties; and, having failed, it is evident that the disappointment must have been equally unexpected to both, because the respondents, although, technically speaking, they contracted with the appellant, individually, yet they must have known that the payments were to be drawn from the assessments to be made; for they signed the articles of copartnership on the express condition or stipulation against assessments on themselves, until the factory should be in operation. The appellant is, therefore, not chargeable with fraud or collusion, and cannot, on that account, under the circumstances of the case, be deprived of the required relief. I do not mean to be understood as urging, that because the respondents acquiesced, and discontinued their work, after the receipt of the notice in *August*, they are not entitled to a just compensation for their previous expenditures, with regard to the machinery; on the contrary, a perfect indemnity ought to be

extended to them, the measure of which, however, being uncertain and contested, I object to its being decided by the respondents, according to their own appraisal, in their answer; for they would thus, although parties in interest, be made judges in their own cause. The *compensation and damages can be fairly and satisfactorily ascertained in another way; and it ought to be done by a jury, on an issue of *quantum damnificatus*, or by a master on reference, giving the party, in either case, an ample opportunity to be heard. A determination thus made by judgment of law, would be altogether unexceptionable, and consonant to the soundest principles of equity.

The general principle is well established, that equity will relieve where a penalty is forfeited, by decreeing to the party his actual damages; (12 *Vesey*, 282. 475.) but where the damages are stipulated, it is settled, that equity will not relieve against them. (2 *Vernon*, 119.) In the case before us, the instalments being a part of the price or value of the whole machinery to be made, shows most conclusively, that they cannot be taken in the nature of stipulated damages; but if even they were to be so considered, they must of necessity be apportioned according to the injury sustained; and to say that this apportionment can be made by the party interested, would be extending a principle, as to the effect of an answer, which would not unfrequently be attended with manifest injustice. I am inclined to the opinion, that according to the principles on which it appears to me the injunction was dissolved, the respondents, on prosecuting for the amount of the remaining instalments, in their answers to other bills which might be filed for relief, would not be precluded from doing away the equity, by swearing that the damages exceeded the amount of those instalments. It is therefore peculiarly fit and proper, that the inquiry, as to the damages, should be made in the manner before stated, by which the points in controversy would be determined, in a manner more satisfactory, in settling the rights of the respective parties.

I cannot accede to the principle, that a court of chancery is restricted, in giving relief, to cases of absolute forfeiture or penalty only. Relief may be granted against the breach of an agreement not wilful or fraudulent, where a full compensation can be made, so as to render the party perfectly secure and indemnified, and place him in the same situation as if the occurrence had not happened; especially, when it approaches so near to a case of forfeiture as the present. **Maddock*, in his *Treatise*, (1 *Madd. Equ.* p. 28.) says, "at law a covenant must be strictly and literally performed; in equity it is sufficient if it be really and substantially performed, according to the true intent and meaning of the parties, as far as circumstances will admit; but if by unavoidable accident, if by fraud, surprise or ignorance not wilful, parties have been prevent-

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ed from executing it literally, a court of equity will interfere, and, upon compensation being made, the party having done every thing in his power, and being prevented by the means alluded to, will give relief." In *Eaton v. Lyon*, (3 Ves. jun. 692.) the same doctrine is maintained. In the present case there could have been no full performance, because the contract had been rescinded; but suppose the appellant had advanced two thirds of the price of the machinery, and after the work had advanced to a certain extent, say one tenth of what was to be done, he had given notice of the failure of the funds to be derived from assessments, from which he expected to be reimbursed, and to be enabled to pay the balance due on the work when completed, and the respondents, in consequence of this notice, had desisted, but, afterwards, claimed to retain the amount received, would not equity relieve as to the portion of the work unfinished? And would not this attempt to retain the whole amount paid, be a claim, in the nature of a forfeiture, sufficient to authorize a court of chancery to interfere? It certainly would be so considered; and if I am correct in the principle stated, it is equally applicable to the present case, which, as the covenants are independent, in a strictly legal sense, would authorize an exaction of the whole price, without regarding a deduction for the part not performed. There is no essential distinction between the two cases, and it must, therefore, be viewed by a court of equity as a case in the nature of a forfeiture, although not literally so.

My opinion, accordingly, is, that the decretal order of the Court of Chancery be reversed, that the cause be remanded, with directions that the injunction be continued, to the end that the damages sustained by the respondents may be ascertained in the manner before stated, by which the amount of the recovery must be controlled.

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*PLATT, J. The covenant to furnish the machinery, and the covenant to pay for it, are admitted to be independent covenants; and the equity set up in the complainant's bill has a double aspect: First, as against the respondents, *White, Taylor & White*, the bill charges, that they are asserting their claim at law for part of the price included in the three first instalments of the contract; that *White, Taylor & White* have not, at any time since the execution of the agreement, performed any part of it, on their part; and that they are utterly insolvent: so that if they should be allowed to recover the price of the machinery, or any part of it, there can be no remedy for a breach of the covenant on their part; and, secondly, that if the appellant is obliged to pay the amount recoverable at law, in the suit against him, the other original associates may be compelled to contribute.

The chancellor has dissolved the injunction; and thereby decided, that upon the bill and answer merely, the suit at

for those instalments ought not, as a preliminary measure, to be restrained. *IN ERROR*

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The general rule is well established, that if the answer denies explicitly and positively, the grounds on which the equity of the bill rests, the injunction to stay the remedy at law must be dissolved. I see nothing in this case to form an exception to that rule; and if so, the answers of *John White* and *Marvin White*, directly responsive to the *gravamen* of the bill, do expressly, and most strongly, deny the complainant's equity.

They deny that they contracted with the appellant merely as agent of the manufacturing company; and swear, that they relied upon his individual responsibility alone, in making that contract.

They deny (if that were material) that they ever received notice from the appellant of his intention to abandon the agreement, until after the three first instalments became due. And they swear, that instead of neglecting to fulfil the contract on their part, as the bill charges, they commenced the performance of the agreement immediately after it was made; that they employed twenty workmen besides themselves, in manufacturing the machinery; that they prosecuted the work in good faith; and that, at the *time when the appellant gave them notice of abandonment, (1st of *August*, 1815,) they had actually expended in labor and materials, for that machinery, upwards of 3,000 dollars; and which had so depreciated, as not to be worth more than 400 dollars, at the time of filing their answers. The injustice and hardship complained of in the bill is, that *White, Taylor & White* were taking an unfair advantage, and abusing their legal rights under the independent covenants, by suing for the three first instalments, without having performed any part of the contract, and not having earned any thing, as a consideration or equivalent for those instalments: this was an essential and indispensable allegation in the bill, without which no injunction would have been granted; the prayer for an injunction would have contained no equity, if the bill had not charged the fact, that *White, Taylor & White* had not proceeded in the execution of the agreement *pari passu* with the stipulated payments. The answers are, therefore, on that point, strictly responsive to the bill; and they positively, explicitly, and circumstantially, deny that allegation. The respondents confess their insolvency; but swear, that it has been occasioned solely by the appellant himself, in refusing to fulfil that contract. These answers we are bound to take as true, in respect to the injunction, in this stage of the cause; and if so, the right of these respondents to recover 1,900 dollars, with interest, as established at law, seems to me to be perfectly consonant with the principles of equity.

Whether the respondents will be entitled, in any form, to recover damages beyond the instalments which fell due under the contract, *before* it was mutually abandoned by the parties,

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or on what principles any ulterior claims are to be adjusted, are questions not before us on this appeal.

My opinion is, that the decretal order for dissolving the injunction ought to be affirmed.

CHILDS and HASCALL, *Senators*, were of the same opinion. All the other senators concurred in the opinions delivered by Mr. Justice *Spencer* and Mr. Justice *Yates*, that the decretal order of the chancellor ought to be reversed: It was, there-upon, ORDERED, ADJUDGED, and DECREED, that *the order dissolving the injunction be reversed, and that the injunction be continued until the hearing, on the appellant's confessing judgment in the suit at law, with leave to the respondents to enter up the same; and that proceedings be had in the Court of Chancery, either by a reference to a master, or an issue at law, to ascertain the damages, if any, sustained by the respondents, by the non-execution or rescinding of the contract, on the part of the appellant, to the end, that the respondents levy those damages only on execution: and it is further ordered, &c. that the record be remitted, &c.

Decree of reversal

JUSTIN LYMAN AND ELIAS LYMAN, *appellants*,
against
THE UNITED INSURANCE COMPANY IN THE CITY OF
NEW-YORK, *respondents*.

The Court of Chancery will not interpose to amend a written instrument, (as a policy of insurance,) on the ground of mistake, without the clearest and most satisfactory proof of the mistake, and of the real agreement between the parties.

APPEAL from the Court of Chancery. The plaintiffs filed their bill for the purpose of having a policy of insurance corrected and amended, so as to change the national character of the vessel, as described in the policy, from an *American* to a *Portuguese* brig.

The bill stated, in substance, that the appellants applied to the respondents for insurance on the brig *Union*, as a *Portuguese* vessel, on a voyage from *New-York* to *Oporto*, &c.; and that the respondents agreed to insure her in that character; but that through fraud or mistake, the policy, as made out and delivered to the appellants, and on which they paid the premium, describes the brig as an *American* vessel.

The answer of the respondents explicitly denied that there was any fraud or mistake; and insisted that the written contract of insurance, as delivered by them to the appellants, expresses the only contract or agreement ever made between the parties on that subject.

*It was proved that the application for insurance, made by the appellants, was in writing, addressed to the president of the company, in the following words: "Sir, what will be the

premium of insurance on the brig *Union*, at and from this to *Oporto*, with a cargo of corn ; at and from *Oporto* to the *Cape de Verd Islands*, for a cargo of salt ; and at and from said islands to her port of discharge in the *United States*, free of *British* capture ? The said brig will sail under a *Portuguese* royal passport. What return, provided the risk ends at *Oporto* ? And, also, what the premium would be against all risks, the voyage round ? The policy to *Justin & Elias Lyman*, or whomsoever it may concern. A valued policy. Valued five thousand dollars. *Justin & Elias Lyman. New-York, 15th of February, 1813.* N. B. The brig *Union* lately belonged to *James Robinson.*" On the order or application for the insurance, the president or agent of the company made the following note or memorandum : "*Free from embargo risk out. 5 per cent. Clause No. 2. Account of themselves, and whom else it may concern.*

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It appeared that, according to the usual course of business in the office of the company, the president and assistant, after considering the application, made a note as above stated, and delivered it to the secretary, as a memorandum of their decision upon and in answer to the application. Whether this memorandum or note was shown to the respondents, or either of them, or in what manner the answer to their application was made, did not positively appear ; but *John I. Jones*, who was the secretary of the company, in his answer, said, that he did not remember nor believe, that any verbal or other explanation, representation, or communication whatever, accompanied the written application of the respondents, or was made to him, until the policy was perfected : that the application for insurance was delivered to him, and he delivered or sent it into the office, to the president and assistant, to which an answer was *soon afterwards, or the same day, returned, to be communicated to the respondents, and which was, in substance, as above stated ; that he understood the offer as proceeding on the ground of the vessel being *American*, and without regarding her foreign license ; that on the same day he communicated the answer to the appellants, who agreed to the same, and the policy was made out accordingly. The answer of the secretary was corroborated by the testimony of *Walter T. Jones*, who was then a clerk of the company. The *Union* sailed on her intended voyage a few days after, and then the appellants sent for the policy, and discovered what they said was a mistake, and applied to the respondents to have it rectified. The officers of the company insisted that there was no mistake, that the policy was drawn according to the contract, and refused to alter it. The appellants then asked for what additional premium the

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company would alter the policy, so as to meet the views of the assured, in striking out their names as owners, and covering the brig as a *Portuguese* vessel? The respondents demanded five per cent additional premium for such alteration, which the appellants refused to give.

The cause having been brought to a hearing, the chancellor, on the 30th of *September*, 1817, pronounced his decree, dismissing the plaintiffs' bill, without costs. For the reasons of the chancellor, vide S. C. 2 *Johns. Ch. Rep.* 630—634.

The cause was argued by *Woodward*, for the appellants, and by *S. Jones, jun.* and *D. B. Ogden*, for the respondents, but the discussion related principally to the evidence and facts in the case.

To show how far the Court of Chancery will go in amending written instruments and policies of insurance, the counsel for the appellants cited 1 *Atk.* 547. 1 *Vesey*, 457. *Bunbury*, 283. 336. *Maxwell's Case*, 1 *Eq. Cas. Abr.* 19. s. 4. 2 *Ch. Cas.* 180. 2 *Atk.* 98. 3 *Atk.* 388. *Gilb. Rep.* 6. *Fitzgibbon*, 213.

The counsel for the respondents cited *Gillespie v. Moon*, 2 *Johns. Ch. Rep.* 585. 6 *Vesey*, 328. 2 *Caines*, 155.

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*SPENCER, Ch. J. The principles which must govern this case are, in my apprehension, very plain and simple. The appellants seek to have a policy of insurance amended, after a loss has happened, on the ground of a mistake in the policy in several particulars, but principally in this, that the brig insured by the respondents, is described in the policy as the "good *American* brig, called the *Union*," when, as it is alleged, it was the intention of the appellants, and must have been so understood by the respondents, that her national character should be *Portuguese*.

Before I examine the facts, I will briefly advert to what I consider to be the law as applicable to this case. It cannot be necessary to refer to cases in support of this proposition that before a written contract can be amended or altered, or the pretence of mistake, the proof must be entirely clear, first, that a mistake, has occurred; and, secondly, that the amendment sought would conform the contract to the intention of both parties. The proof of the mistake must be clear and decisive, for the written contract executed by the one party, and accepted by the other, affords very high evidence, that it speaks the agreement and intention of the parties. Parol communications leading to a contract, consisting of propositions and answers, must necessarily be vague and uncertain; and we are to look for the real contract, in the solemn and consummated act of the parties, the final and written agreement between them. I admit that, notwithstanding the agreement is testified by a written contract, yet if it can be shown to the entire con-

viction of a court, that fraud or mistake has intervened, and the written agreement is variant from the actual contract. in either of these cases, it is competent to a court of equity to amend the agreement in writing, conformably to the clear and manifest intention of the parties. And, upon this point, I adopt the opinion delivered by the chancellor, in *Gillespie and Wife v. Moon*, (2 Johns. Ch. Rep. 585.) that a party may be admitted to show, by parol proof, a *mistake*, as well as fraud, in the execution of a deed or other writing. In most cases, it will be almost impossible to overthrow the deed by proof *aliunde*, that there is a mistake; but where the proof does establish the *fact of mistake, a court of equity will reform and correct the contract. The reasoning and the authorities cited in the case of *Gillespie and Wife v. Moon*, present the point, and establish the position laid down by the chancellor, in a manner calculated to command entire assent; and that case, I will venture to say, will remain as a landmark for future decisions; the reasoning is strong, irresistible, and conclusive.

It is not enough, in cases of this kind, to show the sense and intention of one of the parties to the contract; it must be shown, incontrovertibly, that the sense and intention of the other party concurred in it; in other words, it must be proved, that they both understood the contract, as it is alleged it ought to have been, and as in fact it was, but for the mistake. It would be the height of injustice to alter a contract, on the ground of mistake, where the mistake arises from misconception by one of the parties, in consequence of his imperfect explanation of his intentions. To make a contract, it is requisite that the minds of the contracting parties agree on the act to be done; if one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident there is no contract between them. If it be clearly shown, that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shown, that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract. There may be cases in which the mistake is rendered so palpable, that the denial of it by one party would not be entitled to credit. The question would be, how it ought to have been understood, and how the court believe it must have been understood.

I confess, that I am strongly impressed with the belief, that when the appellants applied to the respondents for insurance, they intended, by the representation, that "the said brig will sail under a *Portuguese* royal passport," that her national character was to be *Portuguese*. But I am as strongly persuaded, that the respondents did not understand the representation in that way, but, on the contrary, that *they believed

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she was to be documented as an *American* ship, carrying a *Portuguese* passport, as an innocent disguise of her real *American* character: and that, consequently, the appellants have failed in making out the fact, that there was a mutual mistake in the policy.

It is to be observed, that the parties never held any communication, excepting by writing, preparatory to the contract of insurance. The appellants made their written application, through the secretary of the company, and the answer was given in short *memoranda* at the foot of the application. The respondents, in their answer, assert, that they understood, and did believe, at the time the appellants' written application for insurance was under consideration, and when the terms and conditions of insurance were settled and agreed upon, that the appellants, who were *American* citizens, were the owners of the brig, or were interested in her; that she was an *American* vessel, and duly documented as such, and was so to continue during her intended voyage; and they further state, that they did not know, nor were they informed, nor did they suppose, that the *Portuguese* royal passport, mentioned in the written application, was a certificate, or document, constituting or evidencing the national character of the vessel, or that the use thereof, by the brig, was inconsistent with her character or obligations as an *American* vessel. The policy of insurance is very high evidence, that the respondents really entered into the contract of insurance in conformity with their understanding of the representation, as set forth in their answer.

I perceive nothing in the evidence which disproves the facts set up in the answer, confirmed as they are by the policy itself. Before going into the evidence, let us attend to the history of this transaction. After the respondents had given their answer to the appellants' application, the secretary of the board communicated it to the appellants, who acceded to the terms proposed by the respondents, and thereupon, and within two or three days, a policy was made out in legal form, and delivered to the appellants.

The policy, had the appellants looked at it, would have shown them the contract into which the respondents had entered. And it certainly is a very lame excuse, that they did not read it before they gave their notes to secure the payment of the premium. It appears, however, that after the vessel actually sailed, and about ten days after the signing of the policy, one of the appellants represented to the president and assistant of the company, that the brig had the protection of *Portuguese* papers, and asked the president whether or not the company considered themselves on the risk; to which the president answered, that the vessel being insured as an *American*, the circumstance of having *Portuguese* papers might prejudice the insurance. The appellant, *J. Lyman*, expressed a wish to have the policy so altered as to permit the brig to sail with

Portuguese papers, and, as the president understood, to use the *Portuguese* flag; which proposition was declined. The answer states, that the appellants, subsequently, applied to know what additional premium would be asked, under the then information, to insure the brig as sailing with *Portuguese* papers, and that an additional premium of five per cent. was demanded.

I mention these facts, to show that the appellants had early information of the true state of the policy, that they treated in relation to its alteration, and that the respondents, before any event had happened to induce them to take the ground they now do, and from the earliest period, considered the insurance as upon an *American* vessel.

Does the memorandum at the foot of the application for a policy, or the parol evidence in the case, show that the respondents understood the contract otherwise? I must say that they do not.

I concur in the opinion of the chancellor, that this note is far too vague and uncertain to justify any correction of the policy. It would not be intelligible to any person, but the officers of the company; and in the essential point, whether the vessel was to be insured as an *American* ship, it is altogether silent; yet the application, with the note at the foot of it, might well have induced the respondents to apprehend that they were asked to insure an *American* vessel. The appellants were known to be *American* citizens, and were believed to be the owners of the brig, or interested in *her; she was known to the respondents to be an *American* vessel, and the note represented her to have lately belonged to *James Robinson*, an *American* citizen. These facts were calculated to induce the belief that she was to be insured as such; and the expression in the application, that "the said brig will sail under a *Portuguese* royal passport," might be well understood, either that she would be documented as a *Portuguese* vessel, or that she would sail under the *American* character, and carry the *Portuguese* passport, as a cover; for it is a notorious fact, that it is not only an innocent, but usual device, to carry papers calculated to deceive one of the belligerents, and insure greater security to the vessel using the cover. At all events, we are not authorized to say, that the respondents did understand the terms of the insurance in the way the appellants probably understood them; the policy itself—the uncertainty of the expression in the application—and the striking fact, that the respondents, within a few days after the policy was subscribed, and before the happening of any occurrence to vary the risk, adhered to the assertion, that they had so understood it, and demanded an additional five per cent to alter the policy, so as to adapt it to the appellants' conceptions, are convincing proofs that the respondents never understood that the vessel was to be documented as a *Portuguese* vessel.

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The appellants' counsel seemed to place great reliance on the case of *Motteux and others v. The Governor and Company of London Assurance and others*. (1 Atk. 544.) The point determined was, that if a policy of-assurance differed from the label, it shall be made agreeable to the label. The counsel, to take the benefit of this case, must show that the note at the foot of the application, is of the nature of the label by which the policy was amended in that case. The label there was precise in its terms, and Lord *Hardwicke* considered it as a memorandum of the agreement in which the material parts of the policy were inserted, the master's and the ship's name, the premium, and the voyage; and it contained the words, "at and from," and in that particular the policy, by mistake, differed from the label. It moreover appeared that this label, thus definite in the material *point, was entered in the books of the company, and signed by the owner of the ship insured, and two of the directors. There is no analogy between this case and that; there the agreement was full, definite, and certain; and here, in the very point in dispute, the note is loose, vague, uncertain, and susceptible of being differently understood by different men.

Let us briefly look to the parol evidence. Mr. *Morton*, the secretary to the *Phœnix Insurance Company*, in *New-York*, understood an application made by the appellants for insurance at that office, in terms similar to the one made at the respondents' office, thus: that the vessel therein intended to be insured was an *American* vessel, but to sail under a *Portuguese* character, and so the *Phœnix Insurance Company* understood it; but he admits that the appellants had fully explained themselves to him; and in his understanding, when it was intended to insure an *American* vessel, as a vessel to sail under a neutral or foreign character, it was not customary to give any national character to the vessel, but merely to state her name; and this kind of insurance was general at that time in *New-York*. Mr. *Thompson* states, that he always considered a *Portuguese* royal passport as a complete register.

These opinions, although respectable, by no means decide, that the respondents understood the proposition made by the appellants in the same way; and, independently of the facts already mentioned, to show that they did not, there is another very strong fact. The *Phœnix Company* demanded 15 per cent. free of *British* capture, and seven and a half per cent. if the risk ended at *Oporto*, whilst, as I understand it, for very nearly the same risk, the respondents demanded only five per cent. that is, from *New-York* to *Oporto*, with the insertion of clause No. 2., which was a warranty against *British* and *American* capture and detention; the warranty against *American* capture was immaterial, because the *United States* were at peace with *Portugal*. If, then, the rate of premium is uniform, or nearly

so, in these offices, the *Phoenix Company* and the respondents *IN ERROR.*
had very different conceptions of the risk to be assured.

I will only add, that the testimony of *Walter T. Jones*, *who was clerk of the company at the time of the insurance, strongly confirms the respondents' answer; he states, that he understood the brig to be an *American* vessel, and intended to have been insured as such; and he believes the president and assistant of the company so understood it; and that it was the uniform practice of the respondents to describe the vessels they insured by their national character, or to insert their national character in the policy, unless it was otherwise specially agreed between them and the insured. That the policy was filled up correctly, and according to the terms upon which the company offered to insure her, as the same were understood by him, and he believes by the company. That shortly after this insurance, several applications were made, in the course of which it appeared that the paper, called a *Portuguese royal passport*, was a document intended to represent the said brig as a *Portuguese* vessel, which (he says) was the first knowledge or suspicion he had, that such was the nature or character of the said document. I have not professed to give all the evidence in the case, for it leads to no safe conclusion. If there were many more witnesses than there are, who would testify, that by a *Portuguese* royal passport, a *Portuguese* register was intended, the question recurs, How did the respondents understand the proposition? I must say, that I consider it a mutual misconception of a fact; and it is impossible to amend a contract on the ground of mistake, so as to make the one party bound by it, when he never assented to that part in which the alleged mistake consisted. If a party will speak equivocally, and will not look to the agreement itself, to find out how the other party understood him, he cannot complain.

For these reasons, in my judgment, the decree of the Court of Chancery ought to be affirmed.

PLATT, J. I see no ground to impute fraud to either of the parties.

The written application on the one part, and the proposition of the company on the other part, are both somewhat ambiguous; and the probable solution is, that, for want of explanations on both sides, there has been mutual misapprehension *and mistake. If so, then equity will *vacate and annul* the contract, but will not make a *new bargain*, by imposing terms on which the minds of the parties never met.

The bill is not framed for relief, by vacating the contract, so as to compel the respondents to return the premium merely. The sole object of the bill is, to alter the terms of the policy, so as to enable the assured to recover, in their action at law, as for a total loss, under the contract of insurance.

It is clear, from all the authorities on this head of equity,

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that a written contract cannot be corrected or amended, unless the mistake be proved in the most certain and positive manner · that is, that the parties mutually agreed upon and intended *one thing*, and, by accident or mistake, the written agreement is made to express *another* and a *different thing*. But where, as in this case, one party intended to cover the risk of the vessel as *Portuguese*, and the other intended to insure it as *American*, it is very evident, that, unless the written policy is to be taken as the contract, there was no agreement between the parties. It was optional with the assured to affirm the contract as expressed in the policy, after they received it, or to have rejected it, and recovered back the premium, on the ground of mutual mistake or misunderstanding, as to the propositions for insurance. Whether the subsequent conduct of the appellants has been such as to preclude them from recovering back the premium, even if the policy was founded in mutual mistake, is a question not now before us.

There is no evidence of any agreement between these parties, different from that expressed in the policy ; on the contrary, the allegations in the bill, on that point, are fully and expressly denied in the answers ; and those denials are strongly fortified by the testimony of the only witness who was present at the negotiation.

My opinion, therefore, is, that the decree of his honor the chancellor ought to be *affirmed*.

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The majority of the court (a) being of the same opinion, it was thereupon ORDERED, ADJUDGED, and DECREED, that *the decree of the Court of Chancery be affirmed, and that the appellants pay to the respondents their costs in defending this appeal, and that the record be remitted, &c.

Judgment of affirmance.

(a) For affirming, 23; for reversing, 4.

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HEMAN KING, *appellant*,
against
DANIEL BALDWIN and REM ADRIANCE, *executors*, and
ELIZABETH BALDWIN, *executrix*, of ELISHA BALD-
WIN, *deceased*, and CALEB FOWLER, *respondents*.

APPEAL from the Court of Chancery. The defendant, *Fowler*, being indebted to the testator, *Elisha Baldwin*, on the 1st of *October*, 1806, executed, together with the plaintiff, as his security, a promissory note to *E. B.*, for the sum of 332 dollars and 89 cents, payable on demand, with interest. In 1811, *Fowler* obtained his discharge under the insolvent act. It appeared in evidence, that in 1808, 1809, and 1810, *Fowler* being embarrassed in his circumstances, *King* called on *E. B.*, represented his approaching insolvency, and urged him to collect the money of *F.*, which *E. B.* refused to do; and one of the witnesses stated, that, on one occasion, *E. B.*, in answer to the request of *K.* to call on *F.*, said, "that he was not afraid but that he should get the money of *F.*; that he was an honest man, and would pay him; and that he would not trouble him, if he never got his money." *K.* and *F.* lived on adjoining farms in **South-east*, in *Putnam* county, about half a mile from each other, and were on very friendly and intimate terms. *E. B.* lived about six miles from them. Some of the witnesses said, that *F.* delivered *K.* cattle and cows, as a security against the demand of *B.*, but which were, afterwards, returned; but other witnesses said, that the cattle were driven on to the farm of *K.* to avoid an execution. One of the witnesses, also, said, that he had been informed and believed, that *B.* had received from *F.* a premium for forbearance towards *F.* on the note; but this testimony was not corroborated by other evidence. In *June*, 1812, a suit was commenced in the Supreme Court, by *E. B.* against *K.* and *F.* on the note. The attorney directed the sheriff not to arrest *F.*, because he had been discharged under the insolvent act. *K.* pleaded the general issue, and gave notice under the plea, of the facts above stated, as to his informing *E. B.* of the failing circumstances of *F.*, and requesting him to sue him and collect the money, as he was then able to pay, and that *E. B.* refused to do so, &c. The venue having been laid in *Ulster* county, the cause was tried in *November*, 1812; and on the trial, *K.*'s counsel offered to give in evidence

The Court of Chancery once having had jurisdiction, will retain it, though the original ground of jurisdiction, the inability to recover at law, no longer exists.

If there be a doubt whether a defence be available at law, and there is no doubt of the jurisdiction of a court of equity, and the defendant at law omits to make his de-

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fence there, or if he sets it up, and it is overruled, on the ground that it cannot be made at law, a court of equity may afford relief, notwithstanding a trial at law.

As where a defendant to a suit at law, being surety for his co-defendant, set up, in his defence, that the plaintiff, though urged by the surety to prosecute and collect the money from the principal debtor, had refused to do so, and delayed until the principal became insol-

vent, which defence was overruled; the surety may, notwithstanding, seek relief in the Court of Chancery, on the same ground as that set up by him at law.

Where a creditor does an act injurious to the surety, or omits to do an act, when required by his surety, which his duty towards the surety enjoins him to do, and the omission is injurious to the surety, the latter is discharged, and may set up such conduct of the creditor as a defence to a suit against him at law.

A surety, when the debt becomes due, may come into a court of equity to compel the creditor to sue for and collect his debt of the principal debtor.

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the facts stated in the notice subjoined to the plea, but the judge ruled that the evidence was insufficient to make out a defence. Time was given for the counsel of *K.* to make a case, on which to move the Supreme Court for a new trial, but no step was taken to bring the matter before the court, and a judgment was, in *May*, 1813, entered up on the verdict which had been found for the plaintiff, for damages and costs, amounting to 532 dollars and 37 cents.

On the 1st of *July*, 1813, *K.* filed his bill in chancery against *B.* and *F.*, stating the above facts, and praying for an injunction, which was granted. The defendants answered; and after the proofs were taken, the cause was brought to a hearing, and the chancellor, in *September*, 1817, pronounced a decree, dismissing the plaintiff's bill, with costs. From this decree the plaintiff appealed.

For the reasons for the decree, vide 2 *Johns. Ch. Rep.* 554. 556—564.

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**Burr*, for the appellant. The defence, or the ground on which the bill is founded, was set up at law against the suit on the note, and was there overruled. It was not, therefore, such a clear defence at law, as ought to preclude the party from having relief in equity. (1 *Atk.* 127.)

The question is not, whether mere delay in the creditor, in not suing the principal debtor, will discharge the surety; but whether the surety can, by any means, discharge himself, by urging the creditor to prosecute the principal, who refuses to do so, and that principal afterwards, becomes insolvent. There can be no difficulty as to the principle of law. (3 *Wheat. Rep.* 156, 157, note.) The only reason ever given against a court of law affording relief, is the mode of proof. Giving time to the maker of a note will discharge the endorser; and there is no reason why the same rule should not apply to one who signs the note as surety. (*Brower v. Jones*, 3 *Johns. Rep.* 230. 3 *Johns. Cas.* 5. 259. 18 *Vesey*, 20. 13 *Johns. Rep.* 174.)

D. B. Ogden, contra. The case of *Pain v. Packard* (13 *Johns. Rep.* 174.) shows, that if there is a good defence at all for the appellant against the note, it is at law, and, therefore, the plaintiff ought not to have relief in equity.

But a suit at law was brought, and this defence was there set up, and overruled as insufficient, and that decision was acquiesced in by the plaintiff. He cannot again avail himself of the same defence in a court of equity.

And, independent of this ground, the plaintiff is not entitled to relief on the merits of the case. It is a well settled principle of law, that mere delay on the part of the creditor to call on the principal for payment, will not discharge the surety; unless such delay takes place in consequence of some stipulation or agreement between the creditor and the principal debtor

varying the terms of the original contract to which the surety *IN ERROR*
is bound.

The answer denies that the appellant ever did request *B.* to collect the money due on the note from *F.*, or gave him notice of his approaching insolvency. There is but one witness who deposes to that fact. But even if such a *request was proved, it ought not to discharge the appellant; for his proper and only remedy was to apply to the Court of Chancery, to compel *B.* to collect the money of *F.*, in which court such terms might have been imposed, on granting relief, as equity would require. (2 *Bro. Ch. Cas.* 580. 2 *Vesey, jun.* 540. 3 *Atk.* 91. 6 *Vesey, jun.* 734. 1 *Cook's Bank. Law*, 211. 10 *East*, 34.)

Again; the appellant had property placed in his hands by *F.* to indemnify him against his liability, which he voluntarily relinquished. And if, by requesting *B.* to collect the money of *F.*, he had acquired any right at law, that right was waived by his subsequent acts and declarations.

Burr, in reply, observed, that there were many cases in which, though the party might set up the ground of relief as matter of defence at law, yet he might avail himself of it in a court of equity; as in the case of a lost bond. There may be concurrent remedies.

SPENCER, Ch. J. The following facts I consider sufficiently proved and established. That the appellant signed the note as surety with *Fowler* to *Baldwin*; that, in 1808 and 1810, the appellant applied to *Baldwin*, representing the approaching insolvency of *Fowler*, and earnestly urged him to prosecute *Fowler* and collect the note; that *Baldwin* peremptorily refused to do so, declaring he would not trouble *Fowler*, if he never got his money.

That, prior to the month of *June*, 1812, *Fowler* was discharged from his debts under the insolvent act, and in the month of *June*, 1812, the note given by the appellant and *Fowler* was put in suit. The evidence renders it reasonably certain, that had *Baldwin* prosecuted the note when he was required to do so, the money might have been collected of *Fowler*.

The appellant was alone arrested, and the cause was tried at a circuit court in *November*, 1812, and a verdict was obtained against the appellant for the principal and interest of the note, upon which a judgment was entered up, and an execution issued. On the trial, the appellant offered proof of the facts, that he gave the note as surety, and *that the plaintiff at law had been required to sue *Fowler*, which he had refused to do, and that if he had sued him as required, the note might have been collected of him; this proof was overruled, and no motion was subsequently made for a new trial.

Two questions have been argued: 1. Whether the appellant

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is not precluded from his rights in equity, in consequence of the proceedings in the Supreme Court, and his acquiescence in the decision at law. 2. Whether the facts of the case, if the appellant is not thus precluded, entitled the appellant to relief in equity.

I do not understand the chancellor to have expressed a decided opinion, that the appellant is concluded from asserting his rights in a court of equity, from the fact of his having been prevented, by a decision at the circuit, from going into his evidence. The only remark upon that point is, "that, perhaps, it would be sufficient to rest the objection to the plaintiff's claim here, on the trial and recovery at law;" he proceeds to show, that the defence was equally cognizable at law and in equity, but there is no express decision on that point.

I consider it an established principle, that where a court of equity once had jurisdiction, it will insist on retaining it, though the original ground of jurisdiction, the inability of the party to recover at law, no longer exists. (1 *Madd. Ch.* 23.) In *Atkinson v. Leonard*, (3 *Bro. Ch. Rep.* 218.) Lord *Thurlow* said, "it did not follow, because a court of law will give relief, that this court loses the concurrent jurisdiction it has always had; and till the law is clear on the subject, the court would not do justice in refusing to entertain the jurisdiction." To the same effect are 9 *Ves.* 464. and 7 *Ves.* 19. In *Bellow v. Muhell*, (1 *Atk.* 126.) Lord *Hardwicke* overruled an objection like the one made here; the plaintiff had been sued at law, and upon the trial, insisted to have a sum of money allowed him, and because it was not allowed, he filed his bill in equity, and his lordship entertained the bill, because it was matter of contract and account, and because he considered the party justly entitled to it.

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I cannot view the appellant's bill as founded on a matter *which is *res judicata*. Suppose a matter of set-off be offered on a trial at law, and overruled, and the party acquiesced, would that have been a bar to a suit? Certainly not; for as the matter was never passed upon by the jury, it never was a subject of trial; it was not the appellant's fault that the evidence was not received, and it would be unjust that he should suffer. If it had been a clear case of a defence at law, the objection would have force; but until the case of *Pain v. Packard*, the principle had not been distinctly settled in the Supreme Court; and, beyond all doubt, if the appellant was entitled to relief, the relief in similar cases, in the *English* courts, had been usually afforded in equity. I entirely subscribe to the opinion of Lord *Redesdale*, (*Bateman v. Willoe*, 1 *Sch. & Lef.* 205.) that, on a bill, in the nature of a bill for a new trial, after a trial at law, and where the subject was passed upon and decided on its merits, though the decision was wrong, a court of equity will not give relief. I go further, and hold, that if the matter was strictly of legal jurisdiction, and he

nature of the case required the defendant at law to make his defence, as in the case of a direct payment upon a bond or note, in such cases a court of equity will not aid the negligence of the party. But if it be doubtful whether a court of law can take cognizance of the defence, and there exists no doubt of the jurisdiction of a court of equity, and if, in such a case, a defendant at law, under the influence of such doubt, omits to make his defence, or if he bring it forward and it be overruled, under the idea that it is not a defence at law, it is not granting a new trial for a court of equity to afford relief, notwithstanding the trial at law. In the case of *Bateman v. Willoe*, Lord *Redesdale* said, "there may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law." But the case of *Rathbone & Rathbone v. Warren*, (10 *Johns. Rep.* 587.) is expressly in point.

The Supreme Court have, undoubtedly, decided the principal question in this cause, in the case of *Pain v. Packard*, *(13 *Johns. Rep.* 174.) that if the payee of a note is required by the surety to proceed, without delay, to collect the money of the principal, who is then solvent, and if the payee neglects to proceed against the principal until he becomes insolvent, the surety may plead these facts at law; and if they are established, he will be exonerated. The chancellor, aware of this decision, has dissented from it, with a liberality and respect calculated to induce a re-examination of the doctrine with the same liberal feelings. It is true, that the case of *Pain v. Packard* was decided without argument at the bar; but it is equally true, that it received a very critical and deliberate examination by the court.

It will be observed, that in the cases of the *People v. Jansen*, and *Pain v. Packard*, the Supreme Court referred to the case of *Tallmadge v. Brush*, and admitted the authority of that case, that mere delay by the creditor in suing the principal would not discharge the surety; and the principle adopted in *Pain v. Packard* was this, that where the creditor did an act injurious to the surety, or omitted to do an act when required, which equity and his duty to the surety enjoined it upon him to do, and which omission was injurious to the surety, in either of these cases, the surety would be discharged.

The chancellor expressly recognizes the principle in equity, and which is supported by a strong current of authorities, that the surety has a right to apply to a court of equity, at any time after the debt is due, to coerce the creditor to bring his action to collect the debt of the principal. Without referring to any other authority, the case of *Rathbone & Rathbone v. Warren*, decided in this court, with entire unanimity, establishes the principle, that if the creditor does any act impairing the

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rights of a surety, or varies the terms of the obligation, or enlarges the time of performance, without consulting the surety. the latter will be discharged.

The only point on which the chancellor and the Supreme Court differ, is this: the chancellor maintains, that the surety has no right, by an act *in pais*, to require the creditor to coerce the principal by suit to pay the debt, but that he must apply to a court of equity, which will lend its *aid for that purpose; whilst in the case decided in the Supreme Court, it is held, that the creditor is bound to prosecute the principal at the request of the surety, and if he fail to do so, and the principal become insolvent afterwards, so that the debt is lost, as against him, the surety will be discharged.

The chancellor considers it unnecessary and inexpedient to introduce what he considers a new principle of action between the creditor and surety; he apprehends that it will open a litigious inquiry as to the certainty and efficiency of the notice, and that such a weapon, put into the hands of a surety, affords a temptation to vexation and fraud.

The principle adopted by this court, in *Rathbone v. Warren*, that a surety will be discharged, if a new agreement be entered into between the creditor and the principal debtor, varying or enlarging the time of the performance of a contract, although amply supported by cases decided in the *English* courts, is of modern growth, even in a court of equity. And it is well settled now, that this defence may be set up at law. *Gibbs*, Ch. J., says, in *Orme v. Young*, that the principle is borrowed from a court of equity. Our system of jurisprudence is in a constant progress of improvement, and some of the most valuable principles have sprung up and attained their perfection within the recollection of many members of the bar. Many cases might be mentioned, but I will only refer to that just and salutary rule, that a court of law will take notice of, and protect the rights of, an assignee of a chose in action. I have witnessed the rise, progress, and establishment of that wholesome and equitable principle. This, too, was borrowed from a court of equity. The soil into which it has been transplanted is congenial to its nature and its perfection; it has saved much litigation and enormous costs.

I do not, then, perceive any solid objection to a court of law taking cognizance of the matters forming the grounds of the appellant's relief, because in such cases courts of equity have also jurisdiction. Much less do I perceive the necessity of applying to a court of equity to compel a creditor to do what equity and good conscience requires of him. Courts of equity, when they interpose to compel a *creditor, at the instance of a surety, to sue the principal debtor, undoubtedly proceed on the sound and just principle, that it is the duty of the creditor to obtain payment, in the first instance, of the principal debtor, and not of the man who is a mere surety that

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the principal shall pay the debt. The doctrine is, that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit, and that the surety has an equity sufficient to invoke the interposition of the powers of a court of chancery for his protection. In every such case, a court of equity proceeds on a pre-existing equitable obligation binding on the conscience of the creditor, to exert himself to obtain payment of the debt from the principal, who is regarded as the real debtor, and who ought to be coerced to pay the debt; and it must be the natural and necessary consequence, that if the creditor, after an order or decree that he shall proceed at law to collect the debt of the principal, omits to do so, and thereafter the principal becomes insolvent, that the surety will be discharged.

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If this duty exists, and does bind the conscience of the creditor, I cannot conceive why it may not be brought into exercise, by an act *in pais*, and without the interposition of a court of equity. Upon an application to that court by the surety, if the facts were conceded, an order or decree, that the creditor should prosecute the principal debtor would be a matter of course; the decree would operate as a mere declaration of the duty of the creditor, and unless his conscience was dead to a sense of moral duty, it would not stand in need of such an admonition. If we are at liberty, as I think we are, to regard the consequences of the contrary doctrine, that the surety must either pay the debt himself, or resort to a court of equity to coerce the creditor to proceed at law against the principal we shall find abundant cause to adopt the principle of the decision in *Pain v. Packard*. The delay and expense are serious evils; the debt itself may, and undoubtedly will, in many cases, be jeopardized and lost, as regards the principal, and the surety will be exposed to the final payment, with a vast accumulation of costs.

*The principal objection to the decision in *Pain v. Packard*, is, "that it will open a litigious inquiry as to the certainty and efficiency of the notice." This objection lies with equal force to all acts *in pais*; such as a demand of the goods in an action of *trover*, a demand of the maker of a note, and notice of the non-payment to the endorser, due demand and notice of non-payment to the guarantee; so in a great variety of other cases, the responsibilities of parties depend on acts *in pais*; and I cannot perceive any ground for alarm or apprehension, as to the mode of proof, unless we are prepared to distrust parol evidence in all cases.

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The chancellor refers to the civil law, in support of his opinion. It appears that *Justinian* altered the civil law, and gave to the surety an exception of *discussion*, by which he might require the creditor to proceed, in the first instance, against the principal; but if the creditor does not proceed

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against the sureties before he has proceeded against the principal, he cannot be obliged to proceed against the principal until he thinks proper; and his forbearing to proceed against him, does not eventually destroy his right of proceeding against the surety, however great the delay has been. (1 *Pothier on Obligations*, by *Evans*, p. 262—266, 267.) The civil law is evidently defective in not affording any process which should coerce the creditor to proceed against the principal, and the superiority of the *English* law is striking and manifest, in this respect.

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My opinion rests on these principles, that the creditor is under an equitable obligation, and such is the essence of the contract, to obtain payment from the principal debtor, and not from the surety, unless the principal is unable to pay the debt; that if the creditor unjustly and improperly collude with the principal, to throw the debt on the surety, or after a full and explicit request by the surety, to proceed at law to recover the debt of the principal, the creditor, from any improper motives, refuses and neglects to do so, and by such refusal and neglect, the means of recovering the debt of the principal are lost, that then the surety is exonerated. This has been treated as a novel and alarming doctrine; but, in my apprehension, it cannot alarm an honest or conscientious creditor; for where is the man who will boldly avow the unjust and immoral principle, that after his debt has become due, and after he has been solicited by the surety to proceed and collect it, by prosecuting both principal and surety, he will abstain from suing, with a view of favoring the principal, and throwing the eventual loss on an innocent man, who, from motives of friendship or humanity, has become a surety?

There is but a minute shade of difference between the opinion expressed by the chancellor, and that of the Supreme Court, in *Pain v. Packard*; and it is simply this: the chancellor holds, that a court of equity must first be appealed to, to compel the creditor to sue at law, whereas the Supreme Court maintain, that he can be required by the surety to sue, without the aid of a court of equity; and if I am right in supposing, that there does exist a moral and equitable duty on the part of the creditor, to collect his debt from the principal in the first instance, (and this must be so, or a court of equity could not interpose at all,) then I maintain, that a court of law may, without overleaping its just jurisdiction, and in analogy to several other cases in which they take notice of existing equities, not only take cognizance of the equity which requires a creditor to collect his debt from the real debtor, but they may apply the consequence of the refusal of the creditor to sue the principal, without which the principle itself would be of no value, by holding that the surety is discharged, if the creditor will not do his duty and collect his debt, if he can, from the principal.

In the case of the *People v. Jansen*, (7 *Johns. Rep.* 336.) we recognized the authority of the case of *Rex v. Barrington*, (2 *Vesey*, jun. 542.) that whether a surety has been discharged or not, is a legal question. It is true, Lord *Loughborough* said, in that case, that it was the form of the security that forced these cases into equity, for that, where the principal and security are bound jointly and severally, the security cannot aver, by pleading, that he is bound as surety; but if he could establish that at law, the rule or principle, by which his liability is to be determined, is a legal principle. *Now, we could not assent to his lordship's proposition, that the fact of a man's being bound as a security, could not be averred at law, if it became material to a legal inquiry; for we understood the rules of evidence to be the same in both courts, and we in vain sought for the principle which allowed the inquiry in a court of equity, and denied it to a court of law; and we, therefore, came to the conclusion, that the defence being a legal one, it necessarily followed, from the general rules of evidence being alike in both courts, that a court of law was competent to administer relief, and to examine all the facts necessary to the relief.

It has been urged, that the surety has nothing to do but to pay the debt, and prosecute the principal himself. Those who make this remark, seem to forget, that whatever may be the form of the instrument by which the principal and surety become bound, it was never the intention of the parties that the surety should, in the first instance, pay the debt; he is actually a guarantee, that the principal shall pay the debt; and it would be a very inconvenient and rigid rule, which should require the surety to pay the debt, before he had any remedy against the principal, by means of the security which the creditor holds; and they seem to overlook, also, the clear and settled principle of equity, that the creditor may be coerced, at the instance of the surety, to prosecute the principal.

I disclaim the introduction of a new principle of law, but have endeavored to show that the principle is one already fixed; that a court of law has cognizance of it, and that, without the previous monition of a court of equity, if a creditor will disregard the rights of a surety so far, as unconscientiously to refuse to proceed at law for the recovery of his money, when fully and reasonably required, and a loss happens by such refusal, that loss ought to be thrown on the party whose unconscientious conduct has drawn it on himself. I am, therefore, of opinion, that the decree of the chancellor ought to be reversed.

VAN NESS, J., said, that although he concurred in the law as laid down by the *chief justice*, yet he did not think that the facts in the case warranted the application of it. *He was,

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PLATT, J. The only question, on the merits of the case, is, whether a request by the surety, and a refusal by the creditor, to sue the principal debtor, then being solvent, with the fact of the subsequent insolvency of the principal, does in equity exonerate the surety from his engagement.

Upon a careful examination of all the authorities on this point, my mind has been irresistibly led to the conclusion, that, according to the rules of law and of equity, which are alike in this case, the facts here disclosed do not form a defence in the suit of the creditor against the surety.

By the law of such contracts, the surety, as original co-obligor or promisor, stands in the same relation to the creditor as the principal debtor, so long as the contract remains unaltered by the act of the creditor, with the acknowledged right in the surety, at any time after the money becomes due, to pay the debt, and to sue his principal, at his own risk, for indemnification. The surety may, also, by resorting to chancery, in most cases, compel the creditor to sue the principal debtor. I say, in *most cases*; for, in answer to a bill for that purpose, the creditor may show a state of facts which would destroy the equity of such an application. It is not *of course* to compel such suit against the principal; and hence, the reason, I apprehend, for requiring the surety to resort to a court of equity for that relief. For instance, suppose the creditor should answer, and prove, that the principal debtor is utterly insolvent, or resides under a foreign jurisdiction, or that the surety had been amply indemnified by his principal, or by a separate contract had assumed to pay the debt for his principal, a court of equity would, in these cases, deny such relief.

The thorough review of all the cases on this head, by his honor the chancellor, in assigning the reasons for his decree, (2 *Johns. Ch. Rep.* 554.) renders it useless for me to refer to, or comment on them.

I concurred in the judgment of the Supreme Court, in the case of *Pain v. Packard*; (13 *Johns. Rep.* 174.) but, upon more full and deliberate investigation, I am convinced, *that* *judgment was erroneous; and I rejoice that I can now so early enjoy the privilege of acknowledging my error. However fit and proper it might be for the *legislature* to modify the rules of law and equity, in order to afford a more cheap and convenient relief and protection to sureties in such cases, (though I doubt very much the expediency of such a law,) I am convinced that, according to the *existing law*, the appellant, as surety, is not entitled, upon the evidence before us, to any protection against the claim of the respondents. Although we are now pronouncing an irreversible judgment in this court

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of dernier resort, we ought not to be unmindful of the momentous truth, that it is our office here, to *expound*, and not to *make* the law.

My opinion is, that the decree of his honor the chancellor might to be *affirmed*.

YATES, J., was of the same opinion.

ADAMS, ALLEN, AUSTIN, BARNUM, BARSTOW, BATES, CHILDS, DAYTON, MALLORY, NOYES, ROSENCRANTS, and WILSON, *Senators*, concurred in the opinion of the *chief justice*, that the decree of the chancellor ought to be reversed.

VAN VECHTEN, *Senator*. The case presents two questions for the decision of this court: 1. Whether the appellant is concluded by the recovery against him at law; and, 2. Whether, upon the merits disclosed by the pleadings and proofs in the cause, he is entitled to the relief which the Court of Chancery has denied him.

The first question turns upon the point, whether the matters alleged in the bill and proved, were available to the appellant, by way of defence to the suit at law; for if they were, and he has neglected to avail himself of them, or if his defence was overruled at the trial, and he has acquiesced in the decision of the judge at the circuit, he cannot be permitted to resort to a court of equity, either to repair such neglect, or review that decision. This general proposition is so well settled, that it cannot be disturbed, without overleaping the jurisdictional line, which has been long established *between the courts of law and equity, and opening a door to protracted and vexatious litigation. The doctrine, that the decision of a court of competent authority is binding upon all courts of concurrent power, is indisputable. It pervades every regular system of jurisprudence, (2 *Kames's Eq.* 367.) and has become a rule of universal law; it is founded on the wisest policy—it springs from the necessity of putting an end to legal controversies, which have been heard and decided. Let me test this case by the foregoing doctrines.

The same matters which are set forth in the appellant's bill, and proved, were stated in the notice to his plea to the suit at law; but the judge at the circuit rejected the testimony which was offered to verify the facts. From his decision, it was competent for the appellant to appeal to the Supreme Court, and thence to this court, in order to a final review and determination. But he has seen fit to waive that course, and to seek relief in the Court of Chancery, upon precisely the same matters which the judge at the circuit had overruled. Here, then, the question is fairly presented, whether the Court of Chancery could rightfully sustain the complainant's bill. It will readily be perceived, that in order to sustain it, one of two

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positions must be assumed: Either that the appellant had no relief at law, or that the Court of Chancery had concurrent power with the court of law. I will, therefore, consider, 1. Whether the matters of defence set up by his notice were cognizable at law; and, if they were, 2. Whether, admitting the concurrent power of the Court of Chancery, that power extended to reviewing the decision of the court of law?

In the case of the *People v. Jansen*, (4 Johns. Rep. 337) the late chief justice said, "that there was nothing in the nature of the defence of a surety to make it peculiarly a subject of equity jurisdiction; and that, whatever would exonerate the surety in one court, ought also in the other. The facts being ascertained, the rule of law must be the same in this court as in the Court of Chancery." In *Rees v. Barrington*, Lord Loughborough asserted the same doctrine. (2 Vesey, jun. 542.) The rule established in both cases clearly is, that if the form of the security will admit *the inquiry at law, whether surety or not, a court of law will take cognizance of the surety's defence. In order to test the applicability of this doctrine to the present case, it is necessary to examine, whether the nature of the security given by the appellant precluded the inquiry at law, whether surety or not. The cases above cited arose on bonds, and the solemnity of such instruments forecloses, in general, all inquiry at law into the consideration of them. But the case before the court arises on a joint promissory note, in which a greater latitude of defence is allowable at law; and, therefore, the consideration may be inquired into and im- each- ed. A payment, or a higher security taken, or a release, may be given in evidence, to defeat a recovery. (4 Johns. Rep. 296. 7 Johns. Rep. 26. 4 Term Rep. 36, 37. 3 East, 258. Doug. 106.) Hence, it is difficult to assign a good reason why the appellant's defence at law was not admitted, provided the matter of it was competent to exonerate him. On this point there is an express decision of the Supreme Court, that the defence was admissible at law. In *Pain v. Packard*, (13 Johns. Rep. 174.) impleaded with *Munson*, the action was commenced on a joint promissory note. The defendant, *Packard*, pleaded, that he signed the note as surety, and that he had urged the plaintiff to put it in suit, which he neglected, until the principal became insolvent; and the court said, "there can be no substantial objection to such a plea." It, therefore, is put beyond dispute, that if the appellant had brought the decision of the judge at the circuit, before the Supreme Court, for re-examination, he would have obtained the full benefit of the defence set up by his notice in the suit at law.

Let me now examine, whether it was competent for the Court of Chancery to interfere, after the merits of this defence had been overruled at law, and when the decision at law was acquiesced in by him.

It will not be pretended, that the Court of Chancery pos-

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sesses power to review the decisions of the Supreme Court ; for that power is vested exclusively in this court. But I admit, that the Court of Chancery can, and will, sometimes, relieve against a recovery at law, upon principles of equity. Such relief, however, according to the rule *laid down by Lord Ch. *Talbot*, must be confined "to new matter, proved to have been discovered since the trial ; otherwise," said his lordship, "it might be made use of as a method for a vexatious person to be oppressive, and for the cause never to be at rest." Lord *Hardwicke*, in recognizing the same rule, observed, "that a notice of the matter to the counsel or agent of the party, is notice to the party, and sufficient to repel the new suit, for otherwise there would be no end of suits." In *Bateman v. Wiloe*, (1 *St. & Lefroy*, 204.) Lord *Redesdale* said, "it is not sufficient to show, that injustice has been done, but that it has been done under circumstances which authorize the court to interfere ; because, if a matter has already been investigated in a court of justice, according to the ordinary rules of investigation, a court of equity cannot take upon itself to enter into it again." In *Le Guen v. Gouverneur & Kemble*, (1 *Johns. Cas.* 492. 502.) this court sanctioned the doctrine, that every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order ; and that if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is for ever precluded.

On the first question, then, I apprehend the law is settled, that the matters stated in the appellant's bill and proved, on which he sought relief in the Court of Chancery, were available to him by way of defence to the suit at law, and that his acquiescence in the decision of the judge at the circuit is conclusive against him. The general rule on which I found this opinion, is intended to put an end to litigation and to cherish peace, that men may know when they may repose with security on the decisions of courts of justice.

I might here stop, inasmuch as the opinion which I have expressed results in favor of the decree of the chancellor. But the second question having also been discussed before this court, and there appearing to be a difference of opinion between the Supreme Court and the Court of Chancery, it may be proper that I should proceed to consider it.

The appellant contends, that he was discharged from his *suretyship, by reason of *Baldwin's* neglect and refusal to sue *Fowler*, when required by the appellant to do so ; and this presents the point on which the Court of Chancery and the Supreme Court differ.

In *Wright v. Simpson*, (5 *Ves.* 734.) Lord *Eldon* said, that he never understood, that, as between the obligee and the surety, there was an obligation upon the former of active diligence against the principal. The surety is a guarantee, and, there-

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fore, it is his business to see that the principal pays. In the *Trent Navigation Company v. Harley*, and in *Peel v. Tattlock*, (10 *East*, 34. 1 *Bos. & Pul.* 419.) the same doctrine is recognized. In *Burm v. Administrators of Pough*, (4 *Dessauss. Rep.* 604.) the Court of Appeals of *South Carolina* said, "a surety will be released where an obligee *does an act* which varies the terms of the *original contract*; but a mere forbearance to sue is not such an act." In *Dehuff v. Turbott's Executors*, (3 *Yeates's Rep.* 160.) the Supreme Court of *Pennsylvania* sanctions the doctrine, that a surety joining in a bond makes the debt his own, and has no power to give directions when the bond shall be put in suit. In *Hunt v. United States*, (1 *Gallis.* 35.) Judge *Story* said, it was a sound principle, that mere delay, unaccompanied with fraud, or a settled agreement with the principal for that purpose, does not discharge the responsibility of the surety. In *Ludlow v. Simond*, (2 *Caines's Cas. in Error*, 30.) Mr. Justice *Spencer* said, both courts of law and equity will cast the responsibility on the surety, if by the terms of his engagement he has assumed it; but neither of them will do this, when he is not brought within the precise scope of his undertaking. *Kent*, Ch. J., said, a surety calculates upon the exact extent of his engagement, and is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency of his responsibility, when it shall arise by the contract. It, therefore, appears to be the established doctrine, that a creditor can hold a surety to the full extent of his contract; but when the creditor makes a new agreement with the principal, without the surety's consent, the latter is thereby discharged. The irresistible conclusion from this doctrine is, that unless the creditor varies, by a new agreement, the contract, by which the surety has bound himself, the obligation of the surety remains unimpaired; and this accords with the common understanding of mankind on the subject. But the appellant contends, and so the Supreme Court has decided in *Pain v. Packard*, *be f re cited*, that the creditor must sue, at any time, upon the surety's request, or the latter will be exonerated. I state the rule thus broadly, because I do not perceive how it is to be qualified; for unless the request of the surety to sue the principal has an imperative effect, in all cases, the rule will be productive of much mischief, and will be rendered uncertain in its application. It has already been shown, that this rule of the Supreme Court is at war with the established doctrine of the courts, both of law and equity, in *England*, recognized and enforced by the highest judicial tribunals of some of our sister states, approbated and sanctioned by an enlightened judge of the Supreme Court of the *United States*, and supported by the decision of the Court of Chancery of this state. And here I must be permitted to express my regret, that I have not been able to ascertain the reasons and authorities, upon which the decision

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of the Supreme Court is founded; as it deprives me of the benefit of those reasons and authorities, in forming the opinion which my duty requires me to pronounce in this cause. I shall, however, proceed, with great respect, to state the reasons which govern my opinion.

I consider the settled and known doctrines of judicial tribunals as invaluable land marks, which ought not to be altered without cogent reasons. Such alterations lead to uncertainty, and frequently involve the substitution of experiment in the room of experience, which is generally a source of more or less inconvenience. Besides, it appears to me worthy of grave consideration, whether a departure, by the judicial tribunals of a particular state, from a well established general rule of law, will conduce to the advancement of justice. It must not be forgotten, that this is a highly commercial state, and that the commercial dealings between our citizens and those of other states, frequently produce contracts with sureties, to a large amount. In making such contracts, it is presumable that parties mean *to repose themselves upon the generally established and known rules of law on the subject. The introduction of a new and local rule may, therefore, be productive of inconvenience, and perhaps of injustice. In cases which may arise between our own citizens, and the citizens of other states or countries, the local rule may mislead the former, but can afford them no protection. Why, then, should a new principle of action, between creditor and surety, be introduced here? The surety has now ample and well known means of relief in a court of equity, which will at once compel the creditor to do his duty, upon just terms. This is the old settled course, recognized in *Nesbit v. Smith*, (2 Bro. Ch. 570.) and in *Burm v. Administrator of Pough*, (4 Dessaus. Rep. 604.,) and, I may add, in all the cases to be found. For when the books speak of the right of a surety to coerce the creditor to sue, by an application to chancery, it may fairly be inferred, that they mean, that he cannot be coerced in any other way. Again, the surety has, at all times, the power of relieving himself, by paying the debt and suing the principal in his own name; and this is within the scope of his undertaking, and according to the common understanding of its true meaning, that he is bound to see the debt paid. He is the person who trusts the principal; for the creditor manifests, by requiring a surety, that he does not rely on the principal; this renders the rule of Lord Hardwicke, (3 Atk. 93.) "that he who trusts most shall lose most," strictly applicable to the surety.

Upon the whole, I am clearly of opinion, that the chancellor's decree ought to be affirmed.

BOWNE, DITMIS, HASCAL, LIVINGSTON, LOUNSBERRY, SEYMOUR, SKINNER, VAN BUREN, and H. YATES, *Senators*, were of the same opinion.

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The members of the court being thus equally divided in opinion,† the *president* (Lieut. Gov. TAYLER) declared his opinion, that the decree of the chancellor ought to be reversed; And it was, thereupon, “ORDERED, ADJUDGED, and DECREED, that the decree of the Court of Chancery be reversed: And it was further *Ordered*, that the injunction *already issued by the Court of Chancery, to restrain the said *Elisha Baldwin* and the said *Caleb Fowler*, and also the sheriff of the county of *Putnam*, from further proceeding on the judgment obtained in the Supreme Court of this state, by the said *Elisha Baldwin* against the said *Heman King* and *Caleb Fowler*, and particularly mentioned in the pleadings in this cause, be, and the same is hereby made perpetual against the representatives of the said *Elisha Baldwin*, and against all persons whomsoever: And it is further *Ordered*, that the several sums of money deposited by the appellant in the office of the assistant register of the Court of Chancery, on or about the 30th day of *August*, 1815, and on the 27th day of *October*, 1817, or on any other days, be paid over, by the said assistant register, to the said appellant, or to his solicitor: And it is further *Ordered*, that the said respondents, *Daniel Baldwin* and *Rem Adriance*, and the said *Ephraet Baldwin*, the executors of the said *Elisha Baldwin*, deceased, pay to the said appellant, or to his solicitor, the *costs* incurred by the said *Heman King*, in the defence of the said suit or action at law, before mentioned; and do, also, pay to the said appellant, or to his solicitor, the *costs* of the said appellant in the Court of Chancery; and that the proceedings be remitted,” &c.

Decree of reversal. (a)

(a) In *Fulton v. Matthews*, (15 Johns. Rep. 433.) the Supreme Court held, that the creditor's delaying to sue the principal, or discontinuing a suit already commenced, without the privity of the surety, would not discharge the surety, although the principal was solvent when the suit was commenced, and, afterwards, became insolvent; as the creditor had not been required by the surety to sue the principal, nor had done any act, or made any contract with the principal debtor, which would disable him from suing him, at any time. In the case of the *Vreede*, (1 Dodson's Adm. Rep.) Sir W. Scott recognized the doctrine of the Court of Chancery, as laid down in *Nesbitt v. Smith*, and *Wright v. Simpson*, and applied it to the case of a surety to a bond given, on the delivery of goods to the claimant, to answer adjudication, in which there had been no demand against the principal for nine years after the decree of restitution. (Vide 3 Wheat. Rep. 154—158, note. *Dunn v. See*, 1 Holt's N. P. Rep. 399.)

The exception of discussion which, by the civil law, a surety was allowed to oppose to the demand of the creditor against him, was not allowed to *judiciary sureties*, nor where the principal debtor was absent, or had no property which could be attached. Although the creditor might defer this *discussion* against the principal debtor, as long as he pleased, without losing his security; (*Dig. Lib. 46. tit. 1. l. 62.*) yet the surety might, although he had not been sued by the creditor, or paid the debt, sue the principal debtor, if he was in failing circumstances, for his indemnity; so where the principal debtor, after the time of payment had expired, neglected for a long time to pay the creditor, the surety might sue him, to compel him to discharge the debt, though the creditor was quiescent. “*Si diu in solutione reus cessabit, aut certe bona sua dissipabit; præsertim si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat.*” (*Dig. Lib. 17. tit. 1. l. 38.*) The law, however, fixed no precise period of delay on the part of the debtor, which should give the surety a right to sue for his indemnity but it was left to depend on the circumstances of each case. Vide *Hayes v Ward*, 4. Johns. Ch. Rep. 123.

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*PHILIP VAN CORTLANDT AND OTHERS, *appellants,*
against
 ABRAHAM I. UNDERHILL and JOSHUA UNDERHILL, *respondents.*

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APPEAL from the decree of the Court of Chancery, in an *original* suit, in which the above named respondents were plaintiffs, and the appellants defendants; and in a *cross suit*, in which the appellants were plaintiffs, and the respondents defendants.

By an indenture of lease, dated the 18th of *February*, 1792, *Philip Van Cortlandt* and *Pierre Van Cortlandt*, since deceased, leased to the respondents, and *Robert Underhill*, *Thomas Burling*, and *William Burling*, a mill-seat and parcel of land, situate on *Croton* river, containing seventy acres, for the term of twenty-one years, from the 1st of *May*, 1792, at the annual rent of forty pounds a year, to commence on the 1st of *November*, 1792. The lessors covenanted, "That the lessees might erect or build any mills on the premises during the term; that they would permit the lessees, for building the said mills and other buildings on the premises, to cut down good and sufficient timber within two miles of the premises, and would, on request, point out where the same should be cut; and it was mutually agreed, that, at the expiration of the said term, the mill, or mills, then standing on the premises, and whatever might appertain thereto, should be valued by two persons, indifferently chosen by the parties, and in case of their disagreement, by a third person, to be chosen by the two; and that the said appraisement, or valuation, should be binding on the parties; that the lessors should pay to the lessees the amount *of the said appraisement or valuation, deducting only from the same the value of the timber which the lessors should find as aforesaid, as it was then standing. That all other buildings then standing on the premises should, in like manner, be appraised or valued, and the amount thereof (not exceeding 200 pounds) be paid to the lessees by the lessors; and that the lessees should have the liberty and privilege of cutting and making use of any trees on the premises (except locust and red cedar) for firewood, to be used by the lessees on the premises," &c.

Owing to accident or mistake, the respondents did not exe-

Persons chosen by the parties to a lease, pursuant to an agreement contained in the lease, to appraise the value of buildings erected on the demised premises during the term, are to be considered in the same light as arbitrators, and their appraisement has the same force and effect as an award.

If, by the agreement of the parties to a submission, the arbitrators have power to nominate an umpire, in case of their disagreement, they may choose the umpire before they proceed to the consideration of the subject.

If arbitrators [# 406] refuse to hear evidence pertinent and material to the controversy, it is such misconduct as will vitiate the award in the Court of Chancery. As where persons chosen by the parties to a lease, to appraise the value of mills

and buildings erected on the premises during the term, refused to hear evidence offered by one of the parties of the *original cost* of the buildings, it was held a sufficient cause for setting aside the award.

So, partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts by either of the parties, if the knowledge of such facts would have produced a different result, are sufficient causes for setting aside an award.

So, it seems, if the assessment of damages, or appraisement of the arbitrators, be so enormous and exorbitant as to induce a belief that the arbitrators must have been corrupt, or grossly partial, their award may be set aside

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cute the lease ; yet they accepted it, and were equally concerned in it with the other lessees named, and were so considered by them and the lessors. *T. and W. Burling*, on the 5th of *February*, 1799, conveyed their interest in the lease to *Robert Underhill* and the respondents ; and in *April*, 1804, *R. U* conveyed all his interest in the premises to the respondents. The lessees, at or soon after the commencement of the term entered into possession of the premises, erected a mill thereon built a dam across *Croton* river, a dwelling-house, out-houses, barns, and other buildings, necessary for their accommodation and the prosecution of their business.

On the 1st of *May*, 1813, the day on which the term expired, the respondents and the lessors mutually chose *Nathan Anderson* and *Samuel Mott*, appraisers, under the agreement in the lease, to appraise and value the mill and buildings standing on the premises. The appraisers met and examined the mills, buildings, &c., and conferred together as to their value, but not being able to agree on an estimate of the value, they chose *David Lydig* to be the *third* person, or umpire, and to whom no objection was made by the parties. *A.* and *M.* then agreed, with the consent of the lessors, to adjourn their meeting until *Lydig* could attend. On the 8th of *July*, 1813, *A.*, *M.*, and *L.*, the three appraisers, with the parties or their agents, met on the premises, and viewed the mills, buildings, &c., and, after examining the lease, hearing the parties in relation to the matters submitted to them, and after deliberating thereon, made their appraisal in writing, under their hands and seals, by which they valued the mills, and whatever appertained thereto, at 18,000 dollars ; and the value of all other buildings erected by the lessees, exclusive of the timber furnished by the lessors, and of some movables, at 500 dollars.

A copy of the report, or award, duly executed by the appraisers, was delivered, on the same day, to each of the parties. The respondents, while the appraisers were engaged in making their valuation, proposed to the lessors, that the value of the timber used by the lessees in erecting the buildings, should be appraised and deducted from the value at which the mills should be appraised, or otherwise paid for by the respondents ; but the lessors did not agree to the proposal.

On the award, or report, being delivered, the respondents offered to the lessors to surrender to them the premises, on being paid the amount of the value, according to appraisal, and to allow the lessors 200 dollars for the timber which had been used in the buildings ; but the offer was rejected by the lessors, who refused to pay the amount of the appraisal. Notwithstanding this refusal, the respondents, on the 15th of *August*, 1813, delivered up the possession of the premises to *Theodorus C. Van Wyck*, the agent of *Pierre Van Cortlandt*, and delivered him the keys of the mills. The bill stated, that *Philip Van Cortlandt* pretended that he had no interest in

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the premises, and that they belonged wholly to the other lessor, and that though he joined in the lease, he was not bound to pay the appraisement; but the respondents charged that they were both equally bound to pay the appraisement, and prayed that the appellant and his co-lessor, might be decreed to pay the respondents the 18,000 dollars, with interest thereon, from the 1st of *May*, 1813, and the 500 dollars, with interest, deducting the value of the timber cut and used by the lessees in the buildings, to be accounted for, as the court might direct, with costs, and for such other relief as to the court should seem meet, &c.

The lessors, in their answer, filed the 10th of *January*, 1814, admitted most of the facts charged in the bill to the year 1813, and they stated various matters relative to the appraisers, and their appraisement, on account of which *they alleged the valuation to be erroneous, excessive, and void.

Pierre Van Cortlandt, one of the lessors, afterwards died, and the respondents, on the 26th of *November*, 1814, filed a bill of revivor and supplement against *Philip Van Cortlandt* in his own right, and against the other appellants, as the legal representatives of *Pierre Van Cortlandt*, deceased.

On the 23d of *June*, 1815, the appellants filed a *cross-bill* against the respondents and *Anderson, Mott & Lydig*, in which they stated a variety of matters relative to the conduct of the appraisers, and to the valuation, to show that the appraisement had not been fairly made, and that the valuation was unreasonable and excessive; and they prayed for a discovery of the matters alleged, and that the appraisement might be set aside, and the value ascertained in some proper way; that they might be allowed to set off against the valuation their damages for waste committed by the lessees, &c., the value of timber cut and carried away, &c.

The respondents put in their joint answer to the cross-bill, and the three appraisers answered separately; but, by an order of the 27th of *May*, 1816, the bill was amended, and *Anderson*, one of the defendants, was struck out.

A great number of witnesses were examined on both sides in the *original* suit, and, by an order of the court, the depositions were allowed to be read, on a hearing, in the *cross* suit, except that of *Anderson*, one of the appraisers, whose name had been struck out of the bill, for the purpose of his being examined as a witness.

The allegations in the pleadings in both suits, and the material parts of the evidence, are stated in the opinion in the court below, and are so far adverted to in the opinions delivered in this court, as to render a further detail of them unnecessary.

The CHANCELLOR assigned the reasons for his decree, which
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were the same as contained in the report of the case in the court below. Vide 2 *Johns. Ch. Rep.* 339—371.

The cause was argued by *T. A. Emmet* and *P. C. Van Wyck*, for the appellants, and by *Harrison* and *E. Williams*, for the respondents.

The counsel for the appellants cited the following cases: 7 *Johns. Rep.* 557. 3 *Ch. Rep.* 76. 2 *Vern.* 251. 515. 1 *Equ. Cas.* 50. *Kyd on Awards*, 358. 9 *Vesey*, 69. *Ambler*, 245. 3 *P. Wms.* 361. 6 *Vesey*, 70. 2 *Equ. Cas. Abr.* 80. *Ansth. Rep.* 735. 3 *Atk.* 644. *Coop. Equ. Pl.* 178.

The counsel for the respondents cited 10 *Johns. Rep.* 147. 1 *Vern.* 157. 2 *Vesey, jun.* 27, 28. *Ambler*, 245. 3 *Atk.* 401. 2 *Ch. Cas.* 214. 3 *P. Wms.* 288. *Wyatt, P. R.* 214.

SPENCER, Ch. J. The questions arising on this appeal are, 1. Whether the arbitrators were legally chosen. 2. Whether, admitting them to have been so, they have been guilty of such misconduct as ought to call for setting aside their award. A third point has been argued, relative to the alleged misconduct of the respondents in concealing the decay of the works, and in adopting measures to deceive and mislead the arbitrators. I shall not discuss that point, because, in the view of the subject which I have taken, it is unnecessary; and because I am not prepared to say that the respondents have been guilty of any fraud in the particulars suggested.

Notwithstanding the ingenious distinctions made between an appraisement, under an agreement entered into many years before the appraisement takes place, and an ordinary submission to arbitration, I confess that I do not feel the force of those distinctions. It makes no difference when the contract was made. It took its effect from the mutual agreement as to the persons to become the appraisers: and, by whatever name they were called, they were substantially arbitrators, with plenary power to decide upon the subject in difference between the parties. The objection to the choice of an umpire, if it were true, that the two persons first chosen had not differed in opinion, is equally untenable. It is well settled, that arbitrators may nominate *an umpire before they proceed to the consideration of the subject submitted, and it is the fairest way of choosing an umpire. (2 *Term Rep.* 645.)

If the arbitrators refuse to hear evidence pertinent and material to the matter in controversy, it is unquestionably such misconduct as will vitiate an award in a court of equity. Partiality and corruption, in either of the arbitrators, or the suppression and concealment of material facts, by either of the parties, if it can reasonably be supposed that the knowledge

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of such facts by the arbitrators would have produced a different result, are causes for setting aside an award. There is also another cause for setting aside an award, as exemplified by the *Butcher of Croydon's* case, for excessive damages. (3 *Ch. Rep.* 76. 2 *Vern.* 251. 1 *Eq. Cas. Abr.* 59.) The butcher had been called a bankrupt knave, and the arbitrators gave him 495 pounds to repair his honor, and the Court of Chancery set aside the award. Upon this case I will merely remark, that I think it good law, if the damages were to be considered so enormous and exorbitant as to induce a conviction, that the arbitrators must have been corrupt or grossly partial. In the case of *Spettigue v. Carpenter*, (3 *P. Wms.* 362.) on a bill filed to set aside an award, it appeared there were several stated accounts between the parties, whereby considerable sums were due from the defendant; but the arbitrator, without any regard to the stated accounts, made up an account in his own way, making the plaintiff indebted 25 pounds, and awarded the former to assign to the latter, a mortgage which he had on his estate. The plaintiff, understanding what award was about to be made, sent a messenger to the arbitrator, a few days before the expiration of the time for making an award, that he desired him to defer making his award until he should talk to him about his demands, in support of the stated accounts, and know what objections were made to them; the arbitrator would not defer making the award, and Lord Chancellor *Talbot* set it aside with costs, on the ground that the arbitrator acted unduly in making it, when the plaintiff had desired to be heard against the arbitrator's determining, in contradiction to so many stated accounts. In *Earle v. Stocker*, (2 *Vern.* 251.) the case of **Pitt v. Dawkra* is recognized, in which the arbitrators promised to hear witnesses, but made their award before they had done so, and it was set aside; and the case of *Smith v. Coryton* is also referred to, where the arbitrator had promised not to make his award until *Smith*, who was unwell, should come abroad; and Lord *Nottingham* inclined, for that reason, to set it aside. In *Walker v. Frobisher*, (6 *Ves. jun.* 70.) the award was set aside because the arbitrator received evidence, after notice to the parties, that he would receive no more, and in which they acquiesced. In the case of *Morgan v. Mather*, (2 *Ves. jun.* 15.) Chief Justice *Eyre*, and Judges *Ashurst* and *Wilmot*, sitting as commissioners, recognize the principle, that for misbehavior in arbitrators the award will be set aside. Justice *Wilmot* said, that corruption in the arbitrators, or their proceeding contrary to the principles of natural justice, though there be no corruption, as if without reason they will not hear a witness, are good causes for setting aside an award. It is useless to multiply authorities on this point, as the principle cannot be controverted, that, for misbehavior in the arbitrators, in refusing to hear material testimony, an award will be set

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aside in equity. The principle is so fundamentally just, that it requires no adjudged cases to support it. How are the arbitrators to do justice between the parties, if they refuse to avail themselves of the only means, the testimony of witnesses, to arrive at an honest and conscientious result? It is true, the arbitrators are judges of the parties' choosing, and I would do nothing to discourage arbitrations. It is a cheap and peaceful method of settling disputes; but to uphold and maintain the awards of arbitrators, when they are guilty of such gross and scandalous misbehavior, as to refuse to hear material evidence, would, in my judgment, produce a universal dread of that mode of adjusting differences. Independently of what is due to individual justice, it would be an alarming doctrine, to hold that there can be no relief against an award, even if the arbitrators outrage every principle of justice in refusing to hear the proofs of one of the parties.

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I agree to the proposition, that if arbitrators hear the evidence offered to them, and make up their award with such lights as the parties afford them, their award, in estimating damages, or on the value of property, will not be set aside, unless their estimates are so enormously disproportioned to the case proved, as to strike every one that there must have been corruption or partiality.

After a rigid and strict examination of the case by the chancellor, he admits his impression to be from the proof, that the property has been considerably overvalued. In this I entirely concur with him, as I do, also, in the conclusion, that unless there be some well established fact, which will, on sound principles, justify us in setting aside the award, it must stand.

With respect to the proof offered to be adduced to the arbitrators by *Van Wyck*, the agent of *Pierre Van Cortlandt*, the chancellor, after commenting on the evidence, comes to the conclusion, that the only testimony he offered to produce was *that relating to the original cost of the dam and raceway*. This certainly was offered to be proved, and it is indisputably true, that the arbitrators refused to hear it.

The testimony of *Theodorus C. Van Wyck*, *Samuel Mott*, *Nathan Anderson*, and *David Lydig*, establish the point, that such evidence was offered in due season, and that the arbitrators declined, and refused to hear it. And it is apparent from the proofs in the cause, that the award was made up, without any evidence of any kind, as to the value of the erections, or their cost, and merely on inspection and personal examination.

His honor the chancellor considered the proof offered of the original cost of the dam and raceway as delusive and injurious, on the ground, "that the cost of a dam and raceway, built twenty-one years before, could not be material as to their then existing value, and that there would be very little, if any, analogy between the original cost and the present value, considering the length of time which had intervened, and the great

variations in price, and labor, and business, and many other circumstances connected with such works."

On this point, I am under the necessity of dissenting from the opinion of the chancellor. The evidence of the original cost of the dam and raceway would not only be admissible *and pertinent evidence, but, under all the circumstances, the only and the best evidence, to enable the arbitrators to ascertain the value of the works and erections as contemplated by the parties under the provisions in the lease.

The *Van Cortlandts* were proprietors of the land leased, and of the mill-seat; and after the expiration of the lease, it was to revert to them again as their property; during the term, the lessors were to be paid their rent, and on the termination of the lease, the mill or mills, and whatever might appertain thereto, were to be appraised or valued, the amount of which was to be paid by the lessors. The agreement between the parties is substantially this: that, inasmuch as the lessees intended to erect one or more mills, mill-dam and raceway, &c., at their own cost, and as they were to occupy them for a limited time, and they would revert to the lessors, as owners of the land, the lessees were to be indemnified, by an appraisal of the value of the works and erections, when they were surrendered. And what would be the value of them to the lessors? Certainly nothing more than what it would cost them to construct the same works; indeed, it would be less, for the deterioration by use; and necessary and natural decay would form a subject for deduction from the cost.

One method of ascertaining the value would be the judgments of individuals experienced in the construction of mills and their necessary appendages; but, as was very justly observed on the argument, the estimate of the most skilful millwrights is not an accurate standard; there are many circumstances which elude the most careful estimation; and it appears to me, that it would be impossible for men not practically conversant with building mills, and making mill-dams and raceways, to form an opinion of their cost, which would not be entirely conjectural and imaginary; and I do not understand from the case, that either of the appraisers was a practical millwright, or mechanic of any description.

What, then, could throw so much light on the then value of the subjects to be appraised, as evidence of what it originally cost to make them? The lapse of time which had *intervened, would render it necessary and just to make very considerable deductions from the first cost, in consequence of the decay of parts of the works. And if there are variations in the price of materials and labor, of which we have no evidence, surely nothing can be more easily proved; for the period of their erection is not so remote as to induce a belief that there are not many witnesses, who must know the difference between the value of materials and labor at the two periods.

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It appears to me, that evidence of the original cost of the buildings, and of the mill-dam and raceway, with the evidence of variation, if any, in the price of materials and labor, was not only good and pertinent evidence, but that it was the only mean of arriving at a fair, honest, and conscientious estimate of the present value. I doubt whether any man, however high his qualifications, could undertake to state, with precision, the cost of such extensive erections, merely on inspection; and the evidence in this case shows how very fallible the best judgments are upon such subjects.

It strikes me, very forcibly, that not only the appraisers, but the chancellor, have adopted an erroneous idea as to the rule of assessment applicable to this case; Mr. *Mott* seems to suppose, that the value of the raceway is not to be estimated according to its cost or real value, but what would be the benefit of it to the lessors; he says to *Van Wyck*, "I suppose you would not be without the raceway for 10,000 dollars;" and the chancellor speaks "of the variations in business, and many other circumstances connected with such works, as destroying the analogy between the first cost and the present value."

An indemnity to the lessees for the work and labor, and money laid out on the premises, with a deduction for the decays, was all that the contract contemplated. The lessces were not to derive a profit from any contemplated advantage which the lessors might make after the premises reverted to them. The lands, mill-seat, and natural advantages were theirs, and their rights came into full action on the expiration of the lease.

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I am entirely satisfied, that the arbitrators refused to *hear legal, pertinent, and material evidence; and that such refusal amounted to gross misconduct in them; and that, by the well established principles of equity, it is good cause for setting aside the award. My opinion, accordingly, is, that the decree of the Court of Chancery ought to be reversed.

YATES, J. The objection, that *Anderson* and *Mott* were not duly appointed, cannot be sustained; it appears that each party nominated a person, and gave notice of it, and that both parties appeared before them, as arbitrators, without objecting to either of them; they are, consequently, concluded from alleging, that they were not indifferently chosen, according to the terms of the covenant. It appears to me to have been the only correct course they could have adopted; nor can the exceptions taken to the manner of appointing the umpire affect the appraisement or award; it was not necessary that the two should disagree, to authorize the choice of a third person. In *Coppin v. Hurnard*, (2 *Saund.* 133. b.) the subject, with regard to the appointment or election of an umpire, is fully discussed, in a note to the case; and in support of the principle stated, the editor cites the case of *Cowell v. Waller*, (2 *Barn. K. B.* 154.) and *Roe v. Doe*, (2 *Term Rep.* 644, 645.) In

referring to the last case, it appears that an objection was taken, because two arbitrators, who had the power of naming an umpire, had named one, before they had entered into the examination of the subject at all; but the court said there was not any ground for the objection, for it rather seemed to be the fairest mode of choosing an umpire. They added, it had been solemnly determined, about thirty years before, that arbitrators might elect an umpire the instant they began to take the matter into consideration. In the present case, however, it is not necessary to urge this principle; for admitting that there must be a disagreement, to authorize the appointment or election of the umpire, the fact appears to be so. At the time it was made, the weight of evidence is conclusive, that the two arbitrators had been inspecting the premises, and conversing on the subject, for a part of two days, and, after comparing opinions as to the present *value, found it requisite to choose a third person. It is evident, therefore, that the difference of opinion or disagreement alleged to be necessary, did exist. There can be no question, then, but that this was an arbitrament according to the terms agreed upon at the date of the lease; and in pursuance of which, the appraisement, or selection of the arbitrators, took place at the expiration of the time limited. That the time was twenty-one years after the date of the first agreement, does not affect it so as to give a different character to the contract. It must, notwithstanding, be deemed and considered an arbitration, and the appraisement must either stand or fall, according to the settled principles applicable to awards, the binding nature of which, when honestly and fairly obtained, cannot be controverted. I should, at all times, reluctantly yield to any doctrine which would go to destroy their legitimate stability or conclusiveness. It certainly would be a dangerous innovation to place them on a footing with the verdict of a jury, as has been urged in the argument; they are, and ought to be, of a more binding force between the parties. As stated in almost every treatise and reported case on the subject, (3 *Atk.* 494. 1 *Vesey*, 11. 2 *Atk.* 504.) it is a decision of a tribunal of the parties' own choice and election; and no court should interfere with an award, unless there had been fraud, corruption, or misbehavior, in procuring it; for without a strict adherence to those rules, an award, instead of being final and conclusive, would, in almost every instance, be the commencement of a controversy, and produce endless litigation, to prevent which the parties must and ought to be concluded by it. I do not think that the appraisement is so grossly extravagant and unjust as to justify an interference with the award on that ground; still it is evident, that the property has been considerably overvalued; and, it would seem, that the means resorted to, in directing the sides of the cox-pit to be boarded up, and the repairs made immediately before the appraisement, might in some degree have contributed

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towards a fictitious increase of the value; yet, it is probable, that the safety of the mill required the closing of the cog-pit, and that those repairs had become necessary, to place the mill in a proper state and condition for delivering it to the lessors at the expiration of the time. No fraud ought, therefore, to be attributed to the lessors on account of those acts.

That the machinery erected in the mill, under the patent right of *Evans*, was protected by it, and that the right of using it was appurtenant, appears to me correct; but *Evans* having taken out his first patent in 1791, if the lessees had acquired the right previous to the year 1805, it is clear, that the patent under which the license had been obtained, must have expired before the termination of the lease; and then I do not think that the provision, contained in the law of the *United States*, extending this patent to *Oliver Evans*, passed in 1808, would have authorized the arbitrators to have taken it up as an item to be valued.

The act, after directing a patent to issue to *Oliver Evans*, contains this provision, "that no person who may have paid *Oliver Evans* for a license to use his said improvements, shall be obliged to renew said license, or be subject to damages for not renewing the same." The lessees having enjoyed this right for the full period intended by them, and the lessors having an interest in the machinery, under the lease, the provision cannot operate to their prejudice, and they ought not to be made chargeable; but the case does not show at what time the license, under the patent of *Oliver Evans*, was procured. We must, therefore, infer, as the arbitrators did take it into consideration, that it was taken out subsequent to the extension of the patent to *Evans*, and, of course, that it has been correctly noticed by them.

It is further alleged, that this award ought to be set aside for the misbehavior or misconduct of the arbitrators; 1st. in holding a private and *ex parte* meeting or communication with one of the parties, on the subject before them; and, 2d. for refusing to hear evidence material to the inquiry, with regard to the same subject, offered by one of the parties.

There can be no doubt, if either of these charges is substantiated, that it must prove fatal to the award. In *Burton v. Knight*, (2 *Vern.* 515.) the principle, as to the first exception, is decided, that private meetings of the arbitrators with one of the parties, on the subject before them, is partiality sufficient to vitiate the award. In *Spettigue v. Carpenter*, (3 *P. Wms.* 361.) the plaintiff, having submitted to an award, desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him, though this was within two or three days before the time for making the award was out, yet the request not being complied with, it was set aside, upon the ground that the arbitrator had acted unduly. Other cases might be

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cited, of setting aside awards for the misconduct of arbitrators, for acts of the same nature; but the general principle is too well established to render it necessary. The truth of the above charges, then, is the important inquiry before us. It appears, from a minute investigation of the testimony, that the first charge, as to the private and *ex parte* communication, is groundless; the weight of evidence is clearly with the respondents. That charge rests altogether on the deposition of *Anderson*, in opposition to which *Underhill*, *Mott*, and *Lydig* concur in stating, that no such *ex parte* or private conversation or communication, was held by the appellants with *Underhill*, in the absence of the other parties. They state, that he was sent for, to obtain some information relative to the mill of *Philip Van Cortlandt*, not connected with this controversy; that *Van Cortlandt* was sent for at the same time, and was present with *Van Wyck*; and *Underhill* states, that *Anderson*, at that time, asked him some question relative to the cost of the dam and raceway, that he answered, he did not know, as no separate account thereof was kept, but only an account of the cost of the whole works. It is true, *Mott* and *Lydig* declare that they have no recollection of it; and one of them says, he has no belief of any such question being asked; but that it is perfectly reconcilable, for they might not have heard it. Admitting, however, that the question was asked, the parties were present, and what renders it altogether unimportant is, that nothing material was communicated by the answer, and that the decision of the arbitrators could, in no respect, be influenced by it; so that the arbitrators are not chargeable with the alleged *ex parte* communication. There appears, however, to be sufficient grounds for the second charge, that of refusing *to hear material evidence offered by the appellants. In order to present the facts, with regard to this offer, in the most unexceptionable point of view, I shall not advert to the testimony of *Anderson* and *Van Wyck*, but shall confine myself to the facts disclosed in the answers of *Underhill*, *Mott*, and *Lydig*. They all separately state, and admit, that after the appraisers had heard the allegations and proofs of the parties, and had conferred together, *Van Wyck* came into the room and offered to produce witnesses to prove the actual cost of the dam and raceway; that *Lydig* told him, with the acquiescence of the other two appraisers, that such testimony was not material or relevant, as the inquiry was not, what the works had cost, but what they were then worth.

I am not disposed to question the correctness of the opinion of the arbitrators, that the inquiry before them was as to the present value of the improvements; but that the testimony of the original cost of the dam and raceway was irrelevant, and would not have contributed towards ascertaining that value, in my view of the subject, is not correct. It will not be denied, but that information, with regard to the natural situation and

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condition of the mill-site, and of the ground over which the raceway was carried previous to the making of those improvements by the lessees, would be indispensable, in order to discover what had been done, and to obtain correct knowledge of the amount of the original cost; it would be a leading fact in making that inquiry. The periods are not so remote as to render it impracticable to ascertain, by testimony, with reasonable certainty, the difference of expense in performing the same work at the expiration of the lease, and allowing for the deterioration of the dam and raceway. This would, perhaps, be the proper course in estimating the amount to be paid by the appellants, for it is not unfrequent to find, in operations of the same nature, a great difference in the expense, arising altogether from the natural situation of the ground, and the convenience of materials. Those advantages, if they existed in this instance, ought to have been known, and considered by the arbitrators as favorable to the lessors. It cannot be pretended that the appellants *were under obligations, by their covenant, to pay a sum equal in amount to what they would have been willing to give, if totally deprived of the dam and raceway, because they were the owners of the soil and site; the materials were taken off their land; and the object of the covenant in the lease was intended to secure a perfect indemnification to the lessors, and no more; and the value of the improvements, taking into consideration such materials as were not to be paid for, according to the terms of the lease, is the true criterion by which the arbitrators ought to have been governed in making the appraisal. The evidence of the original cost and raceway, offered by the appellants, was, therefore, improperly rejected, and that is ground sufficient to set aside the award.

My opinion, accordingly, is, that the decree of the Court of Chancery ought to be reversed, that both causes be remanded, and that the bill in the original suit, in which the respondents are plaintiffs, and the appellants defendants, be dismissed; and that in the cross suit, wherein the appellants are plaintiffs, and the respondents and others, defendants, a feigned issue be directed to ascertain the value of the mills and appurtenances, according to the terms of the covenants contained in the lease, and also the value of the timber and wood cut by the lessees on the demised premises, and other lands belonging to the lessors, for other purposes than firewood to be used on the premises, and that on the return of the issue, the court below decree accordingly.

PLATT, J., was of the same opinion.

VAN NESS, J., was absent.

ALLEN, Senator. The appellants, in this case, seek to avoid an *award* of arbitrators, appointed in pursuance of a covenant

contained in a lease of certain mill-sites, &c. in the county of *Westchester*. IN ERROR.

The covenant is in these words, "that at the expiration of the term, the mill or mills then standing *on the premises*, and whatever might appertain thereto, shall be valued *by two persons indifferently chosen by the parties, and in case of their disagreement, by a third person to be chosen by the two."

The third person was chosen by the two, and the property was valued at \$18,000, exclusive of certain buildings, which formed a distinct subject of appraisement, and were valued at \$500.

It seems to be conceded, that the award, on the face of it, is *excessive*; but it is a well settled rule *in equity*, that an award of arbitrators of the parties' own choosing, unless outrageously excessive on the face of it, and such as would induce every honest man, *at first blush*, to cry out against it, cannot be set aside, unless there be *corruption, partiality, misconduct*, or the use of an *excess of power* in the arbitrators, or fraud on the opposite party; (3 *Rep. in Ch.* 49. 1 *Cas. in Ch.* 279. 1 *Vern.* 157. 2 *Ch. Cas.* 140. 2 *Vern.* 151. 1 *Vern.* 157. 9 *Mud.* 63. 1 *Atk.* 63. 2 *Atk.* 504. 3 *Atk.* 494. 529. 1 *Ves.* 11. 3 *P. Wms.* 361. 3 *Vin.* 139. pl. 39. 2 *Eq. Cas. Abr.* 80. pl. 8. 2 *Vern.* 514. 2 *Ves. jun.* 15. 5 *Ves.* 846 6 *Ves.* 70. 282. 9 *Ves.* 67, 68. 354.) to which may be added, the case of a palpable mistake as to figures, or of one thing or fact for another. (1 *Ves. jun.* 369. 2 *Vern.* 705. 3 *Atk.* 644. *Amf.* 245.) I agree most fully to the law on this subject, as laid down by his honor the chancellor; but I apprehend that he has mistaken the facts in the case, and erred in the conclusions to be drawn from those facts. The court, I think, should not be very astute in searching for reasons to uphold an award, where the damages, upon the face of it, are manifestly excessive; but, on the other hand, they should be *eagle-eyed* in looking into the proceedings and conduct of the arbitrators, and the acts of the parties, to see that every thing has been conducted *fairly, impartially, and honestly*.

Before we enter into a particular examination of the merits of this cause, it is proper that we should look at the testimony and standing of *Anderson*, one of the arbitrators, who has been examined as a witness.

The competency of this witness has been admitted; but his *credibility* is sought to be impeached, principally on the ground of his having signed the award, and declared it to *be "according to his best judgment and belief." *Anderson*, as one of the arbitrators in this cause, perceived, that his associates were about to make an award, which he was conscious to himself was highly improper and unjust; he felt disposed, therefore, if possible, either to prevent it, or to lessen the amount as much as he could: when *Mott* and *Lydig*, the other two arbitrators, declared their opinion, that the *mill-dam* and *raceway* must

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have cost \$20,000, he observed, that he did not believe they had cost \$14,000. *Abraham S. Underhill* was then called in, as *Anderson* states, and the question put by him to *Underhill*, as to the cost of the mill, raceway, and dam, and he answered, "that they (respondents) had laid out \$20,000." *A. S. U.* in his answer, admits that the question was asked him, and he says, he answered, that, *he did not know what they had cost, as no separate account had been kept, but an account of the cost of the whole of the buildings and improvements*; he does not expressly deny, that he said they had laid out \$20,000, though he is careful to add, that he had stated nothing false. *Mott* and *Lydig*, the other two arbitrators, say, they have no recollection about it; but they directly proposed to *Anderson*, that if he would sign the award, they would come down to \$18,000, which *Anderson* finally agreed to do, saying, at the same time, "that sum was far beyond the value of said premises." In this particular, I think *Anderson* acted like most arbitrators, in like circumstances. I see nothing immoral or improper in such conduct. It is not to be presumed that *Anderson* knew any thing of the law on this subject; he concluded that the award, when made by a majority of the arbitrators, would be binding and conclusive upon the *Van Cortlandts*, whether he signed it or not. And if, by signing it, he could reduce the amount of what he considered a most unconscionable award, it was his duty to do so, though it was still far beyond what he thought the real value of the property. It was a matter of compromise, therefore, which frequently takes place among jurors and arbitrators, for the purpose of making up a verdict or award. And I am not yet prepared to say, that the integrity of jurors and arbitrators is to be impeached, on the ground that they have agreed to a verdict or signed an award, as matter of compromise, for a larger amount in damages than they believed ought to be given. The words "*best judgment and belief*," may be considered mere words of form, put into the award by the attorney or other person who drew the award. As to the other disagreements between *Mott* and *Anderson*, respecting their conferring together, and the appointment of a third person as *umpire*, I consider them of little moment in the cause, when brought to impeach the integrity of the witness; they were mostly *ex parte* conversations between them, which the one might understand different from the other; but whatever these conversations and disagreements may have been, they were all merged in the final appointment of the *umpire*, and if the case had not been at all encumbered with them, the ends of justice might have been as well attained.

I come now to examine, more particularly, the conduct of the arbitrators after the appointment of the *umpire*, and to see whether it was fair and impartial.

It is admitted that there was no corruption in these arbitrators; but I cannot say that the arbitrators have been wholly

free from *partiality or misconduct*, in their proceedings. I think it is very evident from the testimony, that two of the arbitrators were determined to appraise the property in question at its original cost, else why make the declaration to *Anderson*, '*that they believed and were of opinion, that the mill, raceway, and dam, must have cost \$20,000;*' and how could they arrive at this conclusion, except through the declarations of the *Underhills*, or one of them, either from *ex parte* conversation, or in the manner as testified to by *Anderson*? Again, how happens it, that *David Lydig*, the umpire, when the arbitrators were deliberating on the subject of the appraisement, should observe to his associates, "*that the respondents were enterprising men, that they had taken the place in a state of nature, had laid out a great deal of money, and had made it a valuable property; that, therefore, the Van Cortlandts ought either to renew their lease, or pay them what they had laid out;*" thus pointing constantly to the original cost as the foundation of his opinion and his award; yet *Mr. Lydig* was unwilling to hear a syllable of proof on the subject of the *original cost, and no objection being made to this proceeding by either of the other arbitrators, all testimony offered on that subject was wholly rejected as inadmissible. Now, it would seem to me, that upon their own principles, the arbitrators ought to have received testimony as to the original cost of the premises; but, independent of this view of the subject, I think the testimony was improperly rejected. As an item of proof to aid them in forming a correct estimate of the *present* value of the property, by ascertaining the first cost, and adding to that the increased value of materials and labor, and then deducting therefrom the natural wear and decay of the premises during the lease, the calculation, in my judgment, would have brought them much nearer the real value of the premises than they could arrive at from a mere inspection of them. Again; this conduct of the arbitrators would seem, also, to account for the slight examination of the property, as testified to by all the witnesses. Even *Lydig* himself says, "*he does not recollect that they examined every bolt and every stone.*" One of the *Fowlers*, who was a witness in the cause, says, "*supposing the arbitrators wished to see the stones, he had three of them turned up, but they did not appear to take much notice of them, nor examine them, to ascertain whether they were burr-stones or of an inferior kind, and thereupon the deponent discontinued taking up any more of them.*" The arbitrators seem, also, to have taken into consideration, in making the gross valuation, *the improved state of the stand* for milling purposes, and the great increase of business consequent thereon, which, under the covenant, formed no part of the value of the premises. They were only to appraise the buildings and their appurtenances in the state they were in at the expiration of the lease. This error seems to have been adopted by his honor the chancellor, also, when he speaks of "*the*

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great variations in prices, and labor and business, and many other circumstances connected with such works." But it is impossible for me to conceive how any mills, which have been running for 19 years constantly, could be worth as much, *under any circumstances*, as when they first commenced running or as much as the first cost.

*Taking the conduct and proceedings of these arbitrators together, as thus far detailed, and which I think is fairly presented by the case, it appears to me, that they were wanting in impartiality and fairness, and may be justly said to have *misconducted*.

2. Another ground of setting aside awards is, that arbitrators have *exceeded their powers*.

In this case, the arbitrators have appraised what are called the *patent licenses* of Mr. *Evans*, which, I think, were not a subject of valuation, being a mere personal privilege, which the *Underhills* might take away, and, according to the act of Congress of 1808, were not assignable. If these rights had been separately valued, and the amount separately stated in the award, and this had been the only ground of complaint, the award might have been set aside *pro tanto* only; but the appraisement being in gross, the award affords no evidence to show the amount of the valuation, as was the case in *Ambler*, 245. cited at bar.

3. *Fraud* in the opposite party is another ground to set aside the award of arbitrators.

The respondents in this case having done certain acts which had the effect to deceive the arbitrators, and to produce an exaggerated valuation of the property, it must be considered fraudulent as to the appellants.

The first item of fraudulent conduct in the party is the declaration of *Abraham I. Underhill* to the arbitrators, that the *mill, raceway, and dam, or the whole expense of the buildings and improvements*, cost 20,000 dollars. The party here was bound to know, or ought to have known, the first cost of these improvements, and, if asked the question, to have told the truth. He states, in his answer, that no separate account had been kept of the cost of each separate item of property; but admits, that an account of the whole of the buildings and improvements had been kept, and he denies that he made any false declarations to the appraisers respecting the matters submitted to them.

By an exhibit in the case, it appears, that the whole expense of the *mills and improvements at Croton* cost only 5,953*l.* 11*s.* 9*d.*, or 14,883 dollars and 97 cents; this exhibit was made in the hand-writing of one of the respondents, or *some person in their employment, and, as testified by one of the *Burlings* was handed to him and his brother, by the respondents themselves, on a settlement of their accounts as partners in the concern. This document affords pretty strong evidence of a want of good

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faith on the part of the *Underhills*, and, in my judgment, goes far to impeach the answer of the respondents, when they say, "*they are confident, and believe, that the dam, raceway, and mills, including the alterations in the machinery, cost, at least, 18,000 dollars; and, also, the answer of Joshua Underhill, who states, in his separate answer, that "the whole expense of the buildings and improvements amounted to about 20,000 dollars."*

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These respondents must, undoubtedly, have known of this exhibit, but had, probably, forgotten that they had furnished the *Burlings* with it.

Another item of fraud in the respondents is, the repairs put upon the mills, &c. just at the expiration of the lease, and between the expiration of the lease and the meeting of the arbitrators.

These repairs have been treated lightly by the opposite counsel, and, also, by his honor the chancellor, in giving his opinion. But it seems to me, that this conduct of the respondents is more serious in its consequences than has been apprehended, and has not been duly appreciated. It was directly calculated to deceive the arbitrators, and to induce an overvaluation of the property. The charge in the cross bill, of using "*unjust and improper means to conceal from the appraisers the state of repair in which the mills were,*" before the arbitrators viewed and examined them, the respondents deny generally; they admit, indeed, that some short time previous to the expiration of the lease, *they repaired the grist-mill and platform across the raceway; but they say nothing of any repairs subsequent to the expiration of the lease, and his honor the chancellor seems, in a great measure, to have overlooked this fact.*

It is in proof, that these mills, &c. were very much out of repair at the time they ceased to be used. The *Fowlers* both testify to this fact; they say, "*several parts of the mill were in a decayed state, part of the frame was decayed, *the roof was leaky, some of the main posts were rotten, several of the girts were decayed, and almost all the sills, and some of the sleepers; some of the stone foundation was also much out of repair.*" Now, some of the repairs were made just before the expiration of the lease, and after the respondents had ceased to use the mill, such as *wedging up and endeavoring to raise some of the floor-beams that had settled, putting in part of a new sill, and repairing some of the cogs.*" The two *Fowlers* also both testify to repairs subsequent to the expiration of the lease, such as "*putting in new cogs, covering over decayed posts of the mill with boards and shingles,*" &c. William Fowler says, that "*two persons were employed for a fortnight in doing little jobs, by way of repairs, in and about the said mills.*" And these witnesses both declare, "*that these repairs were calculated to make the premises appear to better advantage.*" It is also proved, that these mills ceased to be used in the winter of 1812, on account of the lease expiring in May following. Can

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it, then, be believed, that if these repairs had not been made, and the arbitrators had examined the premises in the situation they were in, when the respondents ceased to use them, or at the expiration of the lease, that the valuation would have been so excessive? It is hardly possible, therefore, to conceive, for what purpose these repairs were made, at the time, and in the manner they were made, unless to deceive the arbitrators, and to produce an overvaluation of the property in question.

It may be said, that the respondents had a right to make such repairs as they thought proper, during the continuance of their lease: This, no doubt, they had a right to do, if done *in good faith*; but in this case, the mills had ceased to run for several months before the lease expired, and the respondents had abandoned all idea of using them any more. They could not, therefore, have made the repairs, for the purpose of enabling them to enjoy the lease. They were not bound, by any covenant in the lease, to deliver up the premises in good repair, but the mills, &c. were to be appraised *in the state and condition* they were in when the lessees had done using them or at the expiration of the lease. But it is still more difficult, upon any just and fair *calculation, to account for the repairs made after the term of their lease had ended.

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The lessees were bound to deliver up the possession of the premises at the close of their term; they certainly had no right to withhold the property from the lessors till they should be paid for their improvements. They had their remedy upon the covenant in the lease, to recover the amount of a fair valuation. But, instead of this, we find them holding over, and intermeddling with the property, without any notice to, or direction from, the lessors. Why make these repairs at all, especially at their own expense, without a prospect of being remunerated therefor? What prospect of remuneration had they, except that of an increased valuation of the premises, which was afterwards to take place? Besides, how could these respondents know what use the reversioners intended to make of this property when it came to their possession; whether they would not direct the mills, &c. to be pulled down, for the purpose of building others, better and more permanent, or that they would not alter them, and convert them to some other manufacturing purposes?

At any rate, I think they had no right to interfere at all with the property, after the expiration of the lease. I can arrive at no other conclusion, than that these repairs were made with a view to deceive the arbitrators, and to produce an overvaluation of the property. It is said, however, in answer to this, that the appellants must have known of these repairs; and as they did not point them out, and expose them to the view of the arbitrators, we are to presume that they acquiesced in them. There is certainly no proof in the case that the appellants knew any thing about these repairs.

the respondents had acted in good faith, they should have notified the *Van Cortlandts* of any serious defects in the mills, and if they needed repairs, to have permitted them to have been made by the appellants, or by their direction. It would seem, then, that these repairs were made without any particular knowledge of the lessors; and, I think, it is as fair to presume this to be the fact, as that the lessors acquiesced in them, because they did not particularly point them out. I should rather infer, *that the repairs, being done without notice, were done to deceive all other parties concerned; and because they had the effect of deceiving the appellants as well as the arbitrators, the *Underhills* ought not, therefore, to profit by it. The fact is not to be denied, that the extent and effect of these repairs were not pointed out, either by the *Underhills*, who made them, and whose duty, I conceive it was, in good faith, to point them out, nor by the *Van Cortlandts*. Nor does it appear, that the arbitrators were, in any manner, made acquainted with these repairs, and, therefore, might have been deceived by them, in making up their judgment as to the real value of the property.

The same observations might apply to the *nailing up of the cog-pit*, and the laying of loose boards over the raceway, &c.; for there seems to have been no real necessity for nailing up the cog-pit, to keep out evil-disposed persons, as stated in the answer of the respondents, any more than at any former period. They lived in the house as before, and the millers also continued there as formerly; but one of the witnesses says, that *Abraham I. Underhill* told him that this was done "to prevent *Van Wyck* getting into the mill." And, it would seem, that these cog-wheels were very rotten and defective; for, from the testimony of one of the *Fowlers*, who tended the mill, it appears, that in the fall of 1813, soon after the *Van Cortlandts* took possession of the premises, "one of the main cog-wheels gave way and went to pieces, from natural decay and rottenness;" and, in 1814, it became necessary to put in a new shaft for one of the water wheels. Here it is said again, that *Van Wyck*, the agent, might have knocked off these boards and discovered this rottenness. But *Van Wyck* did not suspect the honesty and fair dealing of the *Underhills*; not knowing, therefore, or suspecting the motives which led to this act, he was not aware that there was any design practised upon the *Van Cortlandts*. Besides, if the arbitrators, whose particular business it was to examine thoroughly, did not complain of the want of light, why should *Van Wyck*? But I forbear to comment upon this conduct of the respondents; enough is disclosed in the case, to satisfy me, that the award has been procured, both by the misconduct of the arbitrators *and the fraud of the respondents. I am, accordingly, of opinion, that the decree of his honor the chancellor be reversed, and a new valuation directed.

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VAN VECHTEN, Senator. The material facts in this cause have already been fully stated. I shall, therefore, proceed at once to consider the points which it involves. The appellants seek to be relieved from an award made against them, and in favor of the respondents; and I am free to acknowledge that my first impressions were strong against the justice of the award. I have, therefore, examined the subject with considerable solicitude and great deliberation. This examination has, however, resulted in a deep conviction, that the objections which are made to the award are untenable. But I must be permitted to add, that the opinions which have been delivered by the judges of the Supreme Court have produced in my mind some distrust of the correctness of the conclusion at which I have arrived.

The general grounds on which an award may be impeached, according to the settled doctrine relative to awards, appear to me to be resolvable into corruption, or gross misconduct in the arbitrators, or excess of power, or imposition. Courts, both of law and equity, have uniformly asserted, and adhered to this doctrine, for the most forcible reasons. The parties to an arbitrament elect their own judges, and voluntarily clothe them with powers commensurate to a final decision on their rights, unshackled by legal forms and technical rules. Every submission may, therefore, be considered as evincing the intent of the parties to transfer the power of deciding finally upon the matters submitted, from the judicial tribunals to the arbitrators.

It is not surmised, in the present case, that the arbitrators have acted corruptly. We must, of course, look for some other ground to set aside the award; the great topics of complaint; on the part of the appellants, are, 1. An excessive valuation of the property appraised; 2. Misconduct of the arbitrators in refusing to hear competent evidence; *and, 3. Undue means used by the respondents to influence the award.

1. The question of value was expressly submitted to the judgment of the arbitrators, who were to appraise *the mill or mills*, standing on certain lands which had been leased to the respondents, or their assignees, for a term of years, together with whatever might appertain thereto. There can be no doubt, that the submission authorized, and probably the parties contemplated, an appraisement, upon the personal view and examination of the arbitrators; for it appears, that they were men whose concern in mills and milling business, had, as was supposed, qualified them, in an eminent degree, for that purpose. In such a case, the objection of overvaluation, when unsupported by proof of corruption or imposition, cannot be listened to without subverting the foundation of the law of awards. In *Knox v. Symmond*, (1 Ves. jun. 369.) Lord Thurlow laid down the rule, that an award cannot be set aside upon the simple ground of erroneous judgment in the arbitrators, for to

their judgment the parties refer their disputes. In *Morgan v. Mather*, (2 *Ves. jun.* 15.) Lord Chief Justice *Eyre*, and Judges *Ashhurst* and *Wilson*, (when they held the great seal as commissioners,) said, the court does not take upon itself to inquire, whether arbitrators have judged right or wrong upon facts; and on a rehearing before Lord *Loughborough*, he observed, that if parties agree to refer matters to judges of their own choice, this court cannot correct the error of their judgment upon facts. In *Emery v. Wase*, (5 *Ves. jun.* 846.) Lord *A'vanley* said, that arbitrators chosen by the parties ever had, and, he hoped, ever would have, both at law and in equity, an authority, so that the award should not be overhauled, unless for fraud, imposition, or gross mistake. In *Waller v. King*, (9 *Mod.* 63.) the bill was to set aside an award for a palpable excess of damages, and Lord *Macclesfield* held, that he could not disturb it, upon the ground of hardship, because the arbitrators were judges of the parties' own choosing. In *Jackson v. Ambler*, (14 *Johns. Rep.* 103.) the present Chief Justice observed, that arbitrations are domestic tribunals; the arbitrators are chosen by the parties themselves, and frequently *mingle in their decisions their own knowledge of the matters in dispute. Their ends are mainly honest, and tend to terminate intricate disputes with very little expense to the parties; for all these reasons they ought to be reviewed indulgently. Again, in the same cause, (*ib.* 105.) his honor said, that in an arbitrament, by the mere act of the parties, it cannot be made an objection to the award, that it is against law. The doctrine of the cases above cited clearly shows, that the objection of an overvaluation in the present case, unconnected with fraud, gross misconduct, or imposition, cannot be sustained; for this court cannot enter into the valuation, without invading the exclusive province of the arbitrators, assigned to them by the act of the parties, any more than it could set aside the award, on an objection that it was against law.

2. The objection of misconduct in refusing to hear competent evidence, as collected from the pleadings and proofs in the cause, rests on the arbitrators having declined to hear evidence of the real cost of constructing the dam and raceway. It will be perceived, on looking into the case, that the evidence to this point is somewhat loose, ambiguous, and contradictory; I do not, however, mean to stop to examine it on either of those grounds. But in order to determine correctly upon the question here raised, it must be remembered, that the arbitrators were the rightful judges of the materiality as well as of the weight due to the evidence offered. For they were to appraise the mill or mills then standing, &c., with the appurtenances, which evidently implies, that they were to view the premises, as they stood, and thereupon form and express their judgment of the value. It cannot be denied, that they were authorized to hear the testimony of witnesses, to aid them in

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making their estimate of value; but, notwithstanding such testimony, it was confided to, and required of, them to fix the value according to their own judgment. Hence, it may reasonably be inferred, that the arbitrators were chosen for their skill, as mill owners or builders, acquired by their practical concern in such establishments. The evidence offered and rejected, was not that by which they would have been bound to regulate their appraisement; for a distinction is here *to be taken, which, in my view of the question, solves every difficulty. When facts are in dispute before arbitrators, which cannot be ascertained, otherwise than by a recurrence to parol evidence, the refusal to hear the evidence would support the charge of gross misconduct against the arbitrators, because it would shut out the light which was to enlighten and guide their judgment. The evidence, in the present case, was not offered to establish disputed facts, but to aid the arbitrators in making an estimate of the value of certain visible and specified erections. They considered it immaterial for the purpose intended. To what end, then, should they have received it? Can the exclusion of evidence, which they were not required to regard, when in collision with their own judgment, furnish a solid objection to their award? Is it pretended, that they have not made an honest appraisement, according to the best of their judgment? Surely not. Can any one suppose, that the evidence offered would have varied their appraisement? Certainly not; for that would be indulging supposition against the fairness of the award, supported as it is by the oaths of the arbitrators. This was a submission by the mere act of the parties, in which, according to the doctrine of the cases above cited, the award of the arbitrators cannot be disturbed, if honestly made, for error in judgment, either as to the facts, the law, or the value. The case bears no analogy to a trial by jury, where the court is to pronounce upon the admissibility of evidence, and the jury are to decide on its weight. In that case, if the court overrules competent evidence, it withholds from the jury the matters upon which they are to found their verdict, and, therefore, deprives the party offering the evidence, of the means to prove his right. But here the parties have confided to the arbitrators the double office of judges and jurors, and have reposed themselves upon their skill and judgment, to be exercised on a personal view and examination of the subjects to be appraised. It, therefore, appears to me an unsound objection to the award, that the arbitrators refused to hear evidence which they deemed immaterial, and, consequently, were not bound to regard in their estimate of value.

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*3. Let me now examine whether the objection, that the respondents have, by undue means, influenced the award, has been made out. It is founded upon the allegations and proofs, that, about the time of the expiration of the lease, the respondents covered certain decayed and leaky parts of the mills with

boards and shingles, and strewed meal, or flour, and bran, on the floor, to elude the discovery of such decay, and the marks of the leaks. Several witnesses swear to the acts charged, and some depose to their being done with the intent alleged by the appellants. It will, therefore, be necessary to discuss this evidence.

In order to render it effectual, it should appear that success attended the deceptive means used by the respondents.

What is the evidence upon this subject? That the examinations of the mills by the arbitrators were conducted openly, and in the presence of the parties, or their agents. Were either of them ignorant of the age of the mills, or can it be presumed, that they were unapprized that the buildings and machinery had deteriorated by the lapse of time and constant use? This is not pretended. How, then, can it be supposed, that the flimsy practices imputed to the respondents have eluded either the discernment of the arbitrators, or the naturally prying observations of the opposite parties? Does *Van Wyck*, who attended the examination, as agent for Mr. *Van Cortlandt*, swear that he was deceived by them? No. Then, I ask, whence the inference is, or can be drawn, that these practices imposed on any one? Neither *Anderson* nor *Van Wyck*, who had the best opportunity of knowing it, suggest even a belief of the fact of imposition; and the arbitrators, *Lydig* and *Mott*, repel it, by their testimony; they say that they examined the premises until they were entirely satisfied. It is true, that some of the appellants' witnesses depose, that the examination was rapid, and less minute than in their opinions it ought to have been. But who were the proper judges of the sufficiency of the examinations—third persons, who were casually present, or the arbitrators whom the parties had mutually chosen for the purpose? Does it appear that any person requested a more particular examination? No. How happened this, if any one present deemed more particularity in the examination necessary? *The objection of imposition on the arbitrators cannot be sustained, unless they were in fact imposed upon. A fraud resting merely in intention, does not require the aid of the correcting power of this court; nor does a meditated, but unexecuted imposition upon arbitrators, furnish either a legal or equitable ground to impeach their award. Upon the whole, I can discover no evidence in the case to support the last objection; but, on the contrary, the whole current of the proof bears, in my opinion, directly against it.

Under these impressions, I have arrived at the conclusion, that the appellants have failed to make out any objection to the award in question, which is sustainable either at law or in equity. It is probable, that in point of fact, injustice may have been done to the appellants; that the arbitrators may have erred in the amount of their appraisement; but I can perceive nothing in the terms of the submission, or in the law of awards,

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that gives to this court the power of correction. Lord *Redesdale* said (1 *Sch. & Lef.* 234.) it is not sufficient, to authorize the court to interfere, that injustice has been done. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation; and it is more important that an end should be put to litigation, than that justice should be done in every case; the truth is, that owing to the inattention of parties, and several other causes, exact justice can very seldom be done. The late chief justice observed, (11 *Johns. Rep.* 220.) that it is better to preserve consistency in legal principles, although it may not always suit the equity of the individual case, than to make those principles bend to what may be thought the substantial justice of each particular case. Let then the abstract equity of this case be what it may, unless the established rules by which this court is bound to administer justice, entitle the appellants to the relief which they pray for, the court cannot and ought not to grant it. I am, therefore, of opinion, that the decree of the Court of Chancery ought to be affirmed.

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But a majority of the court (a) being of opinion, that the decree of the chancellor ought to be reversed; it was *thereupon ORDERED, ADJUDGED, and DECREED, that the decree of his honor the chancellor, in the original suit, wherein the respondents are plaintiffs, and the appellants are defendants, be, and the same is hereby reversed; and that the bill, in the original suit, be dismissed; and that the plaintiffs therein pay to the defendants therein, their costs in the court below, to be taxed: And it is further ORDERED, ADJUDGED, and DECREED, that the decree of his honor the chancellor in the cross suit wherein the appellants are plaintiffs, and the respondents are defendants, be, and the same is hereby, also, reversed; and that the plaintiffs be restored to all things they may have lost by the last mentioned decree, and have such relief as is sought for, and prayed in and by their said cross bill: And it is further *ordered, adjudged, and decreed*, that the proceedings removed into this court be remitted to the Court of Chancery, to the end that the decree of this court be carried into full effect.

Decree of reversal.

(a) For reversing, 19; for affirming, 7.

JACOB BERRY, *impleaded with C. VAN BEUREN, ap-
pellant, against*
JUSTUS THOMPSON, *respondent.*

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ALBANY,
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V.
LIVINGSTON.

APPEAL from the Court of Chancery. Vide 3 Johns. Ch. Rep. 395.

C. Baldwin, for the appellant.

Sampson, contra.

The court being unanimously of opinion, that the decree *of the Court of Chancery ought to be affirmed, it was, thereupon, Ordered, adjudged, and decreed, that the decree of the Court of Chancery be in all things affirmed; and that the appellant pay to the respondent two hundred dollars, for his damages and costs in defending the appeal; and that the record be remitted, &c.

Decree of affirmance.

creation, to a third person, with knowledge of the original transaction, will not protect it from the scrutiny of a court of equity.

Where the party is sued at law on notes, alledged by him to be usurious, and he suffers a verdict and judgment to be taken against him, without making any defence, or apply-

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ing to the Court of Chancery, in due season, he is concluded, and is not entitled to relief in equity.

An assignment of a debt usurious in its

WILLIAM JAMES M'NEVEN *and others, appellants,*
against
EDWARD P. LIVINGSTON *and others, respondents*

APPEAL from the Court of Chancery. Vide 3 Johns. Ch. Rep. 23. S. C. under the title of *Lawrence and others v. Dale and others.*

T. A. Emmet, for the appellants.

Riggs and S. Jones, Jun. for the respondents, Edward P. and Robert L. Livingston.

C. Baldwin, for the executors of Robert Fulton, deceased, respondents.

assignee of such right, not connected with the enjoyment and exercise of their common privilege under the patent.

Where a party intends to abandon or rescind a contract, on the ground of a violation of it by the other, he must do so promptly and decidedly, on the first information of such breach. If he negotiates with the party, after knowledge of the breach; and permits him to proceed in the work, it is a waiver of his right to rescind the contract.

Where two persons are joint proprietors of certain patent rights, as for navigating vessels by steam, one of them, on the mere ground of such joint interest or concern, is not responsible for any special contract or undertaking entered into by the other with any

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A majority of *the court* (a) being of opinion, that the decree of the Court of Chancery ought to be affirmed, it was, thereupon, *Ordered, adjudged, and decreed*, that the decree of the Court of Chancery be affirmed, and that the appellants pay to the respondents for their costs in defending the appeal, and that the record be remitted, &c.

Decree of affirmance.

(a) For *affirming*, 16; for *reversing*, 6.

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*HERMAN HENDRICKS, *appellant*,
against
JACOB T. WALDEN and others, *respondents*.

Vide 2 Johns.
Ch. Rep. 283.
the points de-
cided, and de-
cree affirmed.

Appeal from the Court of Chancery. Vide 2 Johns. Ch.
Rep. 283.

C. Baldwin, for the appellant.

Boyd and T. A. Emmet, for the respondents

March 31st.

THE COURT being unanimously of opinion, that the decree of the Court of Chancery ought to be affirmed, it was, thereupon, *Ordered, adjudged, and decreed*, that the decree of the Court of Chancery be affirmed; and that the appellant pay to the respondents for his costs, &c., and that the record be remitted, &c.

Decree of affirmance.

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CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

IN JANUARY, MARCH, AND APRIL, 1820. (a)

MOSES BARTLETT, *plaintiff in error,*
against
 WILLIAM CROZIER, *defendant in error.*

THIS was an action on the case, originally commenced in the Court of Common Pleas of the county of *Washington*. The declaration set forth, "for that whereas all *overseers of highways* are bound, by the laws of the land, to repair and keep in order the highways within the several districts for which they shall be elected *overseers*: and whereas the said *M. B.* on the 5th of *April*, 1814, at the annual town-meeting, held at the hotel, in the village of *Salem*, in the town of **Salem*, in the county of, &c., was duly elected an *overseer of highways* for the said town, for the district known and distinguished by the name of district No. 14, in the said town of *S.*, and dur-

No civil action will lie against an overseer of highways, at the suit of an individual, for an injury which he has sustained, in consequence of the neglect of the overseer to [* 440] keep a bridge in repair: nor, it seems, against the commissioners of highways, though, if such private action would lie at all, it would be

(a) Several of the cases decided were argued at an adjourned session of the court, held at the city of *Albany*, on the first day of *November* last.

against them; but the party injured can sue for the penalty only, imposed by the statute (sess. 36. ch. 35. 2 N. R. L. 270. 1 Rev. Stat. 501. 503.) for each neglect or breach of duty.

If, however, a civil action would lie, at the suit of the person injured by a bridge out of repair, it must be on the statute, and the declaration ought to state specially the cause of action arising under the statute, and every fact requisite to enable the court to judge whether there has been a breach of duty. It is not enough to state, generally, that the defendant was an overseer of highways, and wilfully neglected his duty, and suffered the bridge to remain out of repair, whereby the plaintiff's horse fell through, and broke his leg, &c. And such a declaration is not aided by a verdict; for though a title defectively set out may be cured by verdict, yet a verdict will not cure a total defect of title.

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ing the term of one year from the said 5th of *April*; and on the same day and year aforesaid, at, &c. took, &c. the oath required of him, as overseer as aforesaid, by the act, &c., which oath, &c. was afterwards, to wit, on the 7th of *April*, &c. duly filed in the office of the town clerk of the said town of S.; yet the said *Moses*, being such overseer, well knowing the premises, but wrongfully and injuriously intending to injure the said *W. C.*, and *not regarding his duty in that behalf, as overseer of district No. 14, but wholly neglecting the same*, negligently and wilfully suffered and permitted a certain *bridge*, in the said district, and on a public highway, in said district, to be and remain for a long space of time, to wit, for the space of three months, to wit, from the 1st of *January*, 1815, to the 1st of *April*, 1815, *broken, shattered, dangerous, and wholly unfit to travel over*, to wit, at, &c. he, the said *M. B.*, being such overseer as aforesaid, during all this time, *well knowing the said bridge to be so broken, shattered, dangerous, and wholly unfit to travel over as aforesaid*; and whereas, afterwards, to wit, on the 13th of *February*, 1815, the said *W. C.* was possessed of a certain mare of great value, to wit, the value of 100 dollars, and was then and there driving the said mare over the said bridge, whereby, by reason of the wilful negligence of the said *M. B.*, in not repairing the said bridge, the said mare of the said *W. C.* fell through the said bridge, and thereby broke her leg, and was greatly wounded, &c., by means of which, &c. she became and was of no use or value to the said *W. C.*, and he, the said *W. C.*, has been put to great charges and expense of his moneys in and about the feeding, keeping, taking care of, and endeavoring to cure the said mare, in the whole amounting to a large sum of money, to wit, the sum of 100 dollars, &c. The second count was similar to the first, alleging that the defendant, not regarding in any wise his duty as overseer of highways as aforesaid, did not repair, or cause and procure the said road and bridge to be repaired, &c., by reason whereof an action hath accrued to the said *W. C.*, &c. *The third count was similar to the second, except that it stated that the mare was driven by a servant of *W. C.* The defendant pleaded not guilty, and a verdict having been found for the plaintiff, on which the Court of Common Pleas gave judgment, the cause was brought, by a writ of error, to the Supreme Court; and the error assigned was, that the declaration was insufficient in law to maintain the action.

The Supreme Court affirmed the judgment of the Court of Common Pleas, and from this judgment of affirmance a writ of error was brought, returnable in this court.

The *chief justice* stated the reasons of the judgment in the court below, for which, vide 15 *Johns. Rep.* 250—255.

Crary, for the plaintiff in error. 1. At the common law.

there is no remedy by action, at the suit of an individual, for not repairing a bridge; the only remedy is by indictment against the county. If the action is intended to be on the statute, the statute must be referred to and rehearsed. (1 *Roll. Abr.* 49. 1 *Com. Dig. Action upon the Statute*, (G.) (A. 3.) 5 *Com. Dig. Pleader*, (C. 76.) *Cole v. Smith*, 4 *Johns. Rep.* 197. *Newcomb v. Butterfield*, 8 *Johns. Rep.* 342. *Bigelow v. Johnson*, 13 *Johns. Rep.* 429. *Jacob's Law Dict. Highways*, III.) If there is no reference to the statute, it is waived; and if the action is at common law, it cannot be supported by statute. An *overseer of highways* is not an officer known at the common law. And there is, at common law, a distinction between *highways* and *bridges*. The *town*, or *parish*, are bound to repair the highways, unless some individual is bound to repair, by prescription or by tenure. But in case of *bridges*, if no particular person is bound by prescription, or *ratione tenuræ*, to keep them in repair, the whole *county* must repair them; and the remedy, in either case, is by presentment or indictment. (2 *Inst.* 700, 701. 3 *Com. Dig. Chemin*. B. 2. B. 3. *Cro. Car.* 365: 1 *Lord Raym.* 715. 4 *Burr.* 2510. 5 *Burr.* 2700. 5 *Term Rep.* 499. 1 *Esp. N. P. Rep.* 147. *Dalt. J.* 26.) An action on the case will not lie by any individual against the inhabitants of the county, for an injury *sustained in consequence of a bridge being out of repair. (*Bro. Abr. tit. Action sur le Case*, pl. 93.) In the case of *Russel v. The Men of Devon*, (2 *Term Rep.* 667.) the Court of K. B. said, there was no precedent for such an action, and that, on the ground of the very great inconvenience, it ought not to be maintained. *Ashhurst, J.*, observed, "but it has been said, that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury, by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury, than that the public should suffer an inconvenience." Then, what would be the inconvenience and extreme hardship, if this action against an overseer could be maintained? The *overseer* of highways is compelled to accept the office, under a penalty of twelve dollars and fifty cents; (2 *N. R. L.* 125. sess. 36. ch. 35. s. 10. 1 *Rev. Stat.* 505.) but if he is to be made liable to the action of every individual who may be injured, in consequence of a road or bridge being out of repair, who would not prefer paying the penalty? Could any person be found willing to accept such an office? The office is created by the statute, which prescribes the duties, and imposes penalties for a neglect of them; but it gives no action for damages to any individual, and the right of action cannot be implied.

2. In all actions against an officer, whether at common law, or by statute, the declaration must state the particular duty,

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and the neglect of it. The declaration, in this case, states merely that the defendant was appointed an overseer of highways; it does not aver that he had any duty to perform, unless, as overseer, he was bound to repair the bridge at his own expense. By the statute, (2 N. R. L. 270. sess. 36. ch. 33. 1 Rev. Stat. 505.) the overseers have nothing to do with bridges; they are, when directed by the *commissioners of highways*, to warn all persons assessed to work on highways, to collect fines, &c., and to execute all such orders of the commissioners of the town to which they belong, as shall be given to them in conformity to law. (Sect. 1, 2, 3. 5, 6, 7, 8, 9, 10. 14.) Until, then, the commissioners have *taken the steps pointed out by the statute, there is nothing to be done by the overseers, who are subordinate to the commissioners. It does not appear from the declaration, that any directions were given by the commissioners to the appellant, relative to this road or bridge; nor that he had any authority to compel any assistance; he was without power and without duty. In *Freeman v. Cornwall*, (10 Johns. Rep. 470.) the court said, that the defendant was not answerable, in a private suit, for any error of judgment, as an overseer of highways; but only in the cases provided for by the statute, which subjects him to a penalty. (*Bouton v. Neilson*, 3 Johns. Rep. 474.) If there was no right of action at common law, before the statute, there can be no remedy but under the statute, and the penalty only, for a breach or neglect of duty, can be recovered. (*Almy v. Harris*, 5 Johns. Rep. 175. *Jones v. Estis*, 2 Johns. Rep. 379. *Rex v. Robinson*, 2 Burr. 805. *Rex v. Royal*, 2 Burr. 832. 834. 1 Com. Dig. Action on the Statute, C.)

Again; in all actions against an officer, it is necessary to state, that he is an officer, what it was his duty to do, and that he has neglected or violated his duty. (5 Com. Dig. tit. Plead-er, 2 O.) Now, the declaration in this case does not state what was the duty of the appellant, but merely that he was an overseer of highways, and that, not regarding his duty, he negligently suffered the bridge to be out of repair. Such a general averment is not sufficient. The presumption of law is, that every officer does his duty. Where the law presumes an affirmative, the plaintiff must aver and prove the negative. (1 Saund. 228. c. 1 Chit. Pl. 226. 2 East, 192.) By the statute, the power to raise money to repair roads and bridges is given to the commissioners of highways; they are to apply the fines and penalties to the repairs of roads and bridges. The overseers have nothing to do with bridges, except where moneys have come into their hands, out of the fund raised by the commissioners, from fines and commutation money. The respondent should have averred and shown, that the appellant had the means in his hands of making the repairs to this bridge.

It seems to have been presumed by the court below, that

what was required by the statute to charge an overseer, was *proved, merely because the declaration stated, that the defendant was an overseer, and had neglected his duty; but before that presumption could legally exist, it ought to have been shown, that the action was brought on the statute; otherwise, that fact is first to be presumed, and, then, that the duty required by the statute has not been performed.

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3. But it will be said, that all these defects and omissions in the declaration are cured by the verdict. If so, then, if the plaintiff should obtain a verdict, it would stand, though the declaration contained no cause of action at all.

The case of *Townsend v. The Susquehannah Turnpike Company* (6 Johns. Rep. 90.) is not applicable; an overseer cannot be considered as the owner of the road, and entitled to take toll.

Foot, contra, admitted, that if a party had no right or remedy at common law, he could not resort to the remedy given by statute, without referring to the statute. The *third section* of the *act relative to highways*, (2 N. R. L. 270. 1 Rev. Stat. 501. 503.) points out the duty of the overseers; they are required to repair and keep in order the highways within the several districts for which they shall be elected, to warn all persons assessed to work on the highways to come and work when required by the commissioners, to collect all fines and commutation money, and to execute all such orders of the commissioners, as shall be given by them in conformity to law. By the thirteenth section, they are to receive moneys for that purpose, and to account in writing to the commissioners for the same. If any road or bridge is directed by the commissioners to be repaired, it is the duty of the overseers to see that the repairs are made. Now, the declaration alleges, that the appellant was an overseer of highways of the town, and being such overseer, well knowing the premises, but wrongfully and injuriously intending to injure the said W. C., and not regarding his duty in that behalf, as overseer, &c., but wholly neglecting the same, negligently and wilfully suffered and permitted the bridge to be out of repair, &c., whereby the mare fell, &c.

To support the declaration, it was necessary for the *plaintiff below to prove, at the trial, that the defendant was overseer, that the commissioners had directed the bridge to be repaired, and had supplied him with money for the purpose, and that he neglected to have the repairs done, &c. Now, after verdict, the court will intend, that all those facts were proved, for the issue joined, necessarily required the proof of them. (1 Chit. Pl. 402. 1 Saund. 228. a. note 1. and cases there cited. 1 Johns. Rep. 276.)

Then the main question arises, supposing all these things to have been proved, and found by the verdict, is the overseer

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answerable to the party injured, by his neglect of duty, in an action on the case? It is said, that the duty is created by the statute, which gives only a penalty of ten dollars for a breach of that duty. Suppose the commissioners had given the overseer 300 dollars, for the purpose of repairing a bridge, and he neglected to do it, and applied the money to his own use, and a horse should fall through the bridge and be killed, would not the owner of the horse have a right of action against the overseer, for an injury caused by his wilful neglect of duty?

The cases decided in *England* are not applicable here. There, it is not the duty of individuals, except by prescription or tenure, to repair roads and bridges, but of *counties, towns, and parishes at large*, (2 *Term Rep.* 106—111.) so that the person injured cannot sue any particular person, nor can he bring his action against the county, town, or parish, as they are not corporations, but is compelled to proceed by indictment. Here the duty is imposed on certain individual officers. In the *King v. The Men of Devon*, (2 *Term Rep.* 667—673.) Lord *Kenyon* admits, that “an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair.” We rely on the well settled principle of the common law, that where it is the duty of a particular person to do a certain act, and in consequence of his neglect to do the act, another sustains an injury, an action lies. The duty of the overseer, it is admitted, is created by the statute, and we complain that, by his wilful neglect to perform that duty, we have suffered an injury.

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* *Crary*, in reply, said, that no case had been cited or shown, in which an action of this kind had ever been maintained. In *England*, by the stat. of 2 and 3 *Ph. & Mary*, c. 8., surveyors of highways were appointed, who were bound to accept the office, under a penalty, and whose duties were like those of the overseers of highways under our statute; yet no case is to be found of a suit against these officers by any individual, for an injury suffered in consequence of a neglect of duty. The statute imposes no duty for the neglect of which an action will lie at common law. No man could be found to accept the trust, if he were liable to such an action.

THE CHANCELLOR. The objections, on the part of the plaintiff in error, to the judgment, may be included in the two following, viz. :

1. That no action will lie against an overseer of the highways, at the suit of any private individual, for not repairing a public bridge.

2. If such action can be sustained, in any case, yet that, in this case, no cause of action is stated in the declaration, and it is bad after verdict.

Though the sum in controversy is small, yet the principle

nvolved in the case is important, and may deeply affect every part of the community. *IN ERROR.*

1. I have examined the *act to regulate highways*, (sess. 36. ch. 33. 1 *Rev. Stat.* 501. 505.) to discover the power and duty of the overseer, and the responsibility to which he may be subjected.

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The 1st section makes it the duty of *the commissioners of highways* to give directions relative to the repairing of the roads and bridges within their respective towns, and to cause to be kept in repair the highways and bridges, and to require the overseers, as often as they shall deem necessary, to warn the people assessed to work on highways, to come and work thereon, with such implements, carriages, cattle, and sleds, as the commissioners shall direct.

The 3d section makes it the duty of the *overseers of highways* to repair and keep in order the highways, within their road districts, to warn all persons assessed, to come and work when required by the commissioners, to collect all fines *and commutation money, and to execute all such orders of the commissioners of the town as shall be given by them in conformity to law.

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From these two sections, it would seem, that the overseer is a mere subordinate agent to execute the orders of the commissioners of highways, and that his duty, so far, consists principally in warning persons to work, and in collecting fines and commutation money.* It is, indeed, said to be the duty of the *overseers* to repair and keep in order the highways, but the first section had already made it the duty of the *commissioners* to give directions relative to the repairing of roads and bridges, and to cause the highways and bridges to be kept in repair. It cannot have been intended to be the equal and concurrent duty of the commissioners and the overseers to do the same thing; for their orders and acts might interfere and come in collision with each other. All the powers of the overseers must, therefore, be taken to be subordinate to, and under the superior control of, the orders of the commissioners, whom they are bound to obey. It is further to be observed, that the duty of the overseers in these two sections is confined to the highways, and it is the commissioners alone who are directed to keep in repair *bridges* as well as highways. The overseers have no concern with bridges erected over streams, except so far as they are directed generally to execute the orders of the commissioners.

The 5th section directs the overseers to deliver to the commissioners lists of the persons in their road districts, liable to work on the highways, and the commissioners are to assess the number of days each man is to work, and return the lists to the overseers. And if the assessment should not be sufficient, the overseers are then authorized, in the 6th section, to make another assessment.

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The 8th section directs commutation money to be paid to the overseer, and the 9th section provides, that the overseer shall make complaint to a justice of all persons who shall not, without due excuse, work according to notice; and the fines to be collected for such defaults are to be paid to the overseer, and this commutation money, and these fines, *the overseer is to expend *in improving the roads and bridges* in his district.

This is the only part of the act which gives the overseer any power or direction as to *bridges*. He is to expend the commutation money and fines which came into his hands, on the roads and bridges; and even this expenditure must, no doubt, be under the direction of the commissioners, who are specially charged with that duty; and they may, by the 11th section, direct this money to another object, by directing the overseers to buy an iron scraper for the use of the road district. Again; by the 13th section, the overseers are annually to account to the commissioners, of the persons who have worked, and the number of days, and of those who have commuted or been fined, and of the manner in which the fines and commutation money have been expended, and they are directed to pay the unexpended moneys over to the commissioners, who are to apply it in making and improving the roads and bridges. The overseers are liable to a penalty of five dollars for neglecting to account, and by the 14th section, they are liable to a penalty of *ten* dollars, for every neglect of duty under the act. The commissioners recover these penalties, and are to apply them in making and improving the roads and bridges in the town.

Here, again, the commissioners are to apply the moneys on the roads and bridges; and it is a fact well worthy of notice, that whenever the repairing of *bridges* is mentioned in the act, it is always in reference to the duty of the *commissioners*, except in the single case of moneys arising from fines and commutation. From the general provisions, and the whole policy of the act, there seems to be no doubt, that even those moneys are to be expended on the roads and bridges *under the orders of the commissioners*. The superintendence and control of the overseers, as well as the general charge and duty of repairing bridges, rest with the commissioners. Thus, also, by the 31st section, the commissioners are to account annually to the supervisors for all the moneys received from fines and commutations, or otherwise, and to report the improvements which have been made, or which are necessary to be made, on the roads and bridges; and the moneys which the board of supervisors shall *direct to be raised in any town for those purposes, are to be paid to the overseers of highways on the order of the commissioners. And again; in the 33d section, if the erection or repair of a bridge becomes an unreasonable burthen on any town, the supervisors are to raise a requisite sum from the county, to be paid over to the commissioners of the town.

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In short, it appears, -from a careful examination of the several provisions of the act, that the commissioners, and not the overseers, of highways, are the responsible persons in respect to the erection or repair of bridges. The overseers have nothing to do with bridges, but in the single instance in which they receive fines and commutation money, or other money, under the order of the commissioners. In every other part of the act, the duty of repairing bridges and expending money for that purpose, is expressly vested in the commissioners. The overseers were intended to be chiefly confined to highways. They are to warn the people to work with their implements and teams on the highways. The construction or repair of bridges is a distinct business. It is an act in which the people summoned to work with their implements and teams, are not supposed to be skilled. Bridges cannot be made or repaired without money to purchase materials, as timber, plank, and iron ; and when the act speaks of the application of money, it is uniformly to roads and bridges. The overseers are under the orders of the commissioners, even in the very section in which it is declared to be their duty to repair the highways ; and they are subject to a penalty for neglecting or refusing to do any service under the act enjoined on them by the commissioners ; and who are even to supply vacancies among the overseers occasioned by death or otherwise.

My conclusion, from this analysis of the act, is, that with respect to bridges, at least, if not to highways, the commissioners, and not the overseers, are the persons properly responsible to the public. With respect to bridges, the duty of the overseers (if any duty they have on that subject, independent of the orders of the commissioners) is to apply the moneys they may receive from commutation and fines (when not directed otherwise) in improving the roads and *bridges. It is not bridges alone, but *roads and bridges* ; and how much shall be applied to each distinct object, or whether all to one, and none to the other, must rest in the judgment and discretion of the overseer.

Such a limited and precarious duty in the reparation of bridges cannot, as I apprehend, afford ground for a private action against the overseer, from any and every person who may happen to be injured by a bad bridge within his district.

When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect. Here is no absolute duty in the overseer to repair bridges. The most that can be said is, that if he should happen to have money in his possession, arising from such an accidental source as fines and commutation, and the commissioners shall not have di-

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rected otherwise, that then he may apply it in improving the roads and bridges. The duty is, at all events, very imperfect, and depending on contingencies for its creation, and resting much on discretion in its performance. The record, in this case, does not inform us what particular bridge was out of repair, nor what expense was requisite to improve it. It only says, that a certain bridge, in the town of *Salem*, was "broken and shattered." It may have been one of the bridges over the *Batten Kill*, a large, and, at times, a very impetuous stream, and we can hardly suppose a case under the statute, in which the overseer of a road district was under such a clear and certain duty to repair a broken and shattered bridge over such a stream, as to be legally chargeable with all damages, to any amount, that travellers might sustain by reason of the bridge.

Another reason why the repair of bridges must and ought to belong to the commissioners, is, that each overseer is confined to his own district, and these districts are created by the commissioners, and they alone can appropriate the moneys arising under the act in such a manner, as to render the burthen of repairing the bridges fair and equal upon all the inhabitants of the town.

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*If a private suit will lie in any case, for the recovery of damages occasioned by a broken bridge, I should suppose that the commissioners of highways are the only persons to be sued. Their duty is to *give directions relative to the repairing of the roads and bridges, and to cause to be kept in repair the highways and bridges.* This seems to be a general duty applicable at all times, and in all places; yet, when we come to read the details of *their* duty, we perceive that it does not exist absolutely, but arises only when the commissioners have money in hand, from forfeitures and penalties, or which has been paid over to them under the direction of the supervisors. Except in one case, the commissioners have a discretion to apply the money upon the roads and bridges; their duty does not go further than to the expenditure of those particular moneys, and they may expend it upon the roads and bridges, or upon either of them, as they shall deem best. The only case in which money is to be exclusively applied to bridges, is when the supervisors raise money on the county at large, for some particular bridge or bridges, and then the appropriation must be specifically applied to such bridge. And though the question, whether the commissioners might not be liable to a private suit, is not now before us, I should rather be inclined to think, that the objection to such a suit applies to them as well as to the overseers. There is no certain, stable, absolute duty in the case. It is not like the case of an individual bound by a private statute, or by a certain tenure, to keep a road or bridge in repair, nor like the case of turnpike companies. There, the duty is perfect, and binding

at all times and is founded on a valuable consideration. The roads and bridges must, at all events, be kept in repair, according to ordinary diligence. It is a condition of the grant. The duty is not casual or contingent, but inevitable. In the case, however, of these commissioners and overseers, the duty depends upon a train of circumstances; it is very indefinite, and is varied and regulated by their discretion. There is not that precision and certainty of duty, that ought to make them responsible to individuals to any extent, and for any damage. The law has not supplied them with the pecuniary means, or armed *them with the coercive power requisite to meet and sustain such an enormous and dangerous responsibility.

The argument to be drawn from the *English* law, on this subject, is very strong against the right of action. There are officers, under the *English* law, equally as under ours, charged with repairing the roads and bridges; they have existed, and been known from ancient times, and yet there is no case in the *English* books, nor any precedent under our colony government, of any such private action; this affords a very strong presumption, that no such action will lie.

No man at common law, says Lord Coke, (2 *Inst.* 701.) was bound to repair a bridge, unless he was charged with that duty under some condition of tenure or prescription. The duty of repairing bridges belonged to the county; and the remedy at common law, for not repairing a public bridge, was by presentment or indictment, in order to avoid multiplicity of suits. (2 *Inst.* 701. *Cro. Car.* 365. *Com. Dig.* tit. *Chemin.* B. 3. 2 *Black. Rep.* 685. *Andrew's Rep.* 101. 235.) The first *English* statute on the subject is the 22 *H. VIII.* c. 5., by which the general sessions of the peace were authorized to inquire into, hear, and determine, all annoyances of bridges broken, and to inflict pains on such as were charged to make and mend the bridges; and this remedy the sessions were to apply, as the K. B. had been used to do. The statute further provided, that if a bridge was within any city or corporate town, the inhabitants thereof should make and repair it; and if not, that then the inhabitants of the shire or county should do it; and the inhabitants were to be assessed by the sessions, for money necessary to make or repair the bridges; and the sessions were to appoint two *surveyors* to receive the money, and see that the bridges were repaired, and to account to the sessions.

Here we find, as early as the time of king *H. VIII.*, officers appointed, analogous to our commissioners or overseers of highways, whose duty it was made to receive moneys and repair the bridges; and yet there is no trace of any private action having ever been brought against these surveyors. It was made a question, at Sergeant's Inn, long after this act *of *H. VIII.*, who ought to repair bridges and highways, and how they should be compelled; and it was held, that as to bridges, the county was chargeable with the reparation of them, and that

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the statute of 22 *H. VIII.* was but an affirmance of the common law on that point; but it was observed, that if a person was entitled to take toll for passing the bridge, he was bound to repair it, for he had the toll for that purpose, *et qui sentit commodum, sentire debet et onus*. So, a man, or a corporation, might be bound to repair a bridge, by reason of some tenure or condition in their grant of land; or if it was a private road over which *B.* had a passage, *B.* might have his writ *de ponte reparando*. But, except in such special cases, it was a county burden, both as to bridges and highways, and the remedy was not by suit against the surveyor or justices, but by presentment or indictment against the county, or against some individuals thereof, for and in the name of all the rest. (2 *Inst.* 701. *Popham*, 192. 13 *Co.* 37. s. 7.)

The next *English* statute on the subject, was the 2 and 3 *P. & M.* ch. 8. which related to highways only, and directed the constables and churchwardens of each parish to call the inhabitants together annually, to choose in each parish, *two surveyors and orderers* for mending highways, who were bound to assume the trust, under a penalty of twenty shillings, and who were to direct and order the persons to be appointed to work on certain days, to be named by the constables and churchwardens. The statute then directs the mode and manner of the work, and prescribes penalties for default, and the moneys arising from fines and forfeitures, were to be bestowed upon the highways.

This statute contains the outline and substance of our own act; and yet no private suit was ever brought against these surveyors and orderers, for damages arising from neglect of duty.

The statute of 1 *Ann.* 1. c. 18. continued the act of 22 *H. VIII.* with some alterations, and, among other things, it directed the general sessions of the peace to appoint *treasurers* to receive and apply, under their direction, the moneys assessed and collected for repairing bridges; and *all fines and forfeitures were to be appropriated for the same purpose.

The statute of 13 *Geo. III.* c. 78. reduced all the former laws on the subject of highways into one act, and by it the sessions were to appoint a surveyor of highways for each parish with a salary, and ample superintending powers relative to the highways. The system of *English* law on the subject now is, that the care of repairing the roads belongs to each parish, and that of bridges devolves upon the county, unless the county or parish can throw the *onus* on some individual, by reason of tenure or prescription. But neither the surveyors, in respect to highways, nor the surveyors or treasurers, in respect to bridges, are held responsible to individuals for the damages which they may sustain by means of the bad or decayed state of the roads or bridges. The remedy, in both cases, is by indictment at the suit of the king, or for the penalty prescribed

by the statutes; and I apprehend that no good reason can be assigned why the overseer or commissioner should be liable to a private suit under our act, or at common law, and yet that the surveyor of highways, under the *English* laws, who is charged with a similar duty, should not be liable. The same rules or principles of law are applicable to both cases.

In the case of *Russell v. The Men of Devon*, (2 Term Rep. 667.) an attempt was lately made in *England* to recover, in a private suit, damages suffered in consequence of a bridge being out of repair, and the attempt was to charge two of the inhabitants of a county in behalf of all the rest. But it was held by the K. B., that no civil action lay against the inhabitants of a county for an individual injury, in consequence of a breach of their public duty. The county was not a corporation for that purpose, and had no corporate fund. The court referred to the case of 5 *Edw. IV.* fo. 3. mentioned in *Brit. tit. Action sur le Case*, pl. 93. as being good law, in which it was held, that if a highway be out of repair, so that a horse be mired and injured, no action lies by the owner against him who ought to repair it, for it is a public matter, and ought to be reformed by presentment. This case, then, is an authority equally to show, that no private suit will lie in a case of a broken bridge, *which is to be repaired by the county, or of a bad road, which is to be repaired by the parish. And when the judges admitted that an action would lie by one individual, for an injury sustained by neglect or default, against any other individual who was bound to repair a bridge, they certainly did not allude to the surveyor, or other public officer entrusted with that duty. They must have alluded to such cases as those mentioned by Lord *Coke*, in which an individual, or a corporation, may be bound to repair a private bridge, or a public bridge, by reason of tenure or prescription, or the grant of the toll.

We have every reason to presume, that our legislature did not intend to charge the officers, entrusted with the superintendence and repair of the public roads and bridges, with any greater responsibility, by private suit, than the penalty given against overseers for neglect of duty. If that had been their intention, and if they had meant to introduce a new rule on the subject, I think the law would and ought to have been explicit. To sustain an action, at this day, against all former practice, is taking these officers by surprise. We have had our commissioners and overseers of highways, from the first settlement of the colony; and the weight and responsibility of the trust must have been understood and settled in public opinion, according to the *English* law. In 1691, the freeholders of each town were directed, by statute, to choose annually *surveyors and orderers* of the work for amending highways. The very names of the officers, we perceive, were borrowed from the statute of *Philip & Mary*. Afterwards,

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there were colony road acts for almost every county. Thus, by an act in 1732, the inhabitants of *Suffolk* county were to mend their highways, under the orders and directions of the commissioners or overseers of highways; and, by acts, in 1744, and 1745, and 1750, each town in the other counties, in the southern district, together with *Dutchess*, *Orange*, and *Albany*, were to keep the roads in repair, and the commissioners were to direct the overseers to warn the people to work; and if the overseers thus neglected to see the roads and bridges mended, they were liable, for every neglect, to a penalty of 40 shillings, which was to be applied towards repairing *the same. Under this colonial usage, founded on the *English* statutes, we derive our present code of highway regulations; and it differs from the *English* in this particular, that with them, the care of bridges belongs to the county, but with us, it belongs to each town, subject, however, to county aid, when the burthen on the town might be too great.

My conclusion, therefore, is, that the only private action against the overseers, is the one given by the act, which is for the penalty of \$10, arising on every breach of duty, and which may be repeated, again and again, for every neglect. But it is with some distrust and reluctance that I have arrived at this conclusion, inasmuch as I am obliged to differ from the opinion of a tribunal, for which I entertain the most entire respect.

2. But, if I am mistaken on this point, and it should be considered by this court, that an action will lie, in certain cases, by an individual against an overseer of the highways, for not repairing a bridge, then I am of opinion, on the second point, that the declaration in the case does not set forth a sufficient cause of action; and it is a defect which is not cured by verdict, but is bad upon a writ of error.

The duties of the overseer are all created and prescribed by the *act regulating highways*, and if an action will lie, it must be founded upon a breach of the duties there enjoined. The declaration ought to have stated specially the cause of action arising under the statute. It ought to have stated specially every fact requisite to enable the court to judge whether there has been a breach of duty. This appears to be a sound and well settled rule of pleading in actions founded upon statute. (*Com. Dig. tit. Action upon Statute, G. & A. 3. Com. Dig. tit. Pleader, C. 76. 4 Johns. Rep. 193. Cole v. Smith. 7 Johns. Rep. 402. Morrell v. Fuller. 8 Johns. Rep. 218. S. C. 8 Johns. Rep. 342. Newcomb v. Butterfield.*)

The declaration in this case states, generally, that the overseer neglected his duty, and wilfully suffered a bridge to remain broken, by means of which the plaintiff sustained an injury. This was not enough. There is no special duty charged, nor are the facts stated from which a breach of *duty is to be inferred. The mere fact, that the defendant was an overseer of highways, and that a bridge within his road district was out

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of repair, gives no right of action. If the overseer had no money, arising either from fines or commutation, and no order, or if he had a contrary order, in respect to the bridge, from the commissioners, he was not guilty of a breach of duty, though he did wilfully suffer the bridge to remain out of repair. He was under no obligation, simply because he was overseer, to repair the bridge. His obligation, if any, arose from the means which he had in his power, and from which alone the law deduced his duty. But the declaration does not state the means, and, therefore, it lays no foundation for the duty. This objection strikes me as fatal. The overseer ought to have had an opportunity, by pleading, to traverse the facts creating his particular and special duty to repair the bridge, but the plaintiff deprived him of that opportunity by omitting to state any such facts. Nor will it be sufficient to say, that the facts creating his duty must have been shown upon the trial, and that we are now, after verdict, to presume so. The court are never to presume a cause of action, even after verdict, when none appears. A title defectively set out may be cured, but not a total defect of title. (1 *Salk.* 364. 3 *Wils.* 275. 3 *Burr.* 1728.) Suppose the declaration had only stated, that it was the defendant's duty to repair a certain bridge, and that, by the neglect of such duty, the plaintiff had lost a horse, but had omitted to state how it was his duty, and had not even stated him to have been an overseer, would that have been sufficient? Yet we might, with equal reason, presume, in that case, as in this, that the duty, whatever it was, or from whatever quarter it arose, must have been made out at the trial, or a verdict could not have been rendered. Stating the defendant to be an overseer, without saying more, is not stating the duty. The word overseer might as well have been omitted, because an overseer is not, merely as such, and by virtue of his office, bound to repair a bridge. He is only bound, under special circumstances, occurring while he is in office; and it is those special circumstances that create the duty, and not the office, by itself. There must be the office, and there must be the money, and they both must concur to create the duty, and the absence of the one is just as fatal to the right of action as the absence of the other.

The rule, on this subject, is well stated by Lord Ch. B. *Gilbert*, (*Hist. C. Pl.* 139.) when he says, that "if any thing essential to the plaintiff's action be not set forth there, though the verdict be found for him, he cannot have judgment, because, if the essential part of the declaration be not put in issue, the verdict can have no relation to it, and if it had been put in issue, it might have been found false. And such matter, as is the foundation of the action, not being alleged, there is no ground for the judgment; as if an action of trespass be brought by a master for beating his servant, and it does not say, *per quod servitium amisit*, this is ill after verdict.

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Whatever is essential to the gist of the action, and cannot be cured by verdict, are such substantial facts as must be laid, so that the defendant may traverse them distinctly, if he pleases; for, as he may traverse the whole, so he may traverse each substantial part, in order to put the weight of the cause upon any thing that will put an end to it."

On the other hand, those defects, or omissions, in pleading, which are cured by the verdict, are those necessary circumstances which are implied by law, and which inevitably follow from the substantial fact charged. Thus, where it is pleaded, that land was assigned for dower, it is not necessary to say it was by metes and bounds, for that follows of course, as included in a lawful assignment; and where it is pleaded that the sheriff made his warrant, it is presumed to have been under seal, for it could not have been a warrant if it was not; and if a man avers he is heir to *A.*, the death of *A.* is implied, for there could be no heir if he were living.

There are some important cases to which I may refer, as a further and more full and complete illustration of these distinctions.

In *Rushton v. Aspinall*, (*Doug.* 679.) the suit was against the endorser of a bill of exchange, and the declaration stated, that the acceptor had accepted, and, according to his acceptance, on request, had refused to pay, of all *which the defendant had notice *on the day of the date*. This was a mistake in the pleading, for the bill was payable in three months after date. On error to the K. B., after verdict, it was contended, on one side, that the facts of the demand and notice were circumstances, without which the jury would not have found for the plaintiff, and it must now be presumed that they were proved to have been made at the proper time. But to this it was replied, that if the rule be carried so far, a writ of error could never be supported in any case after verdict. The court would intend, that facts imperfectly stated had been completely proved, but they never could presume, that a material fact, which was not at all stated, had been proved. Lord *Mansfield*, in giving the opinion of the court, in favor of reversing the judgment, observed, that in looking into the cases, he found the rule to be, that where the plaintiff had stated his ground of action defectively or inaccurately, the circumstances requisite to complete the title so imperfectly stated, must be proved at the trial, and it is a fair presumption, after verdict, that they were proved. But if he omits to state his title, it need not be proved, and there is no room for presumption. That in the case before him, it was not requisite to prove either a demand on the acceptor, or notice to the endorser, because they were not laid in the declaration, nor were they circumstances necessary to any of the *facts* charged. He referred for illustration to the case of *Hitchin v. Stevens*, (*2 Show.* 233.) where the grant of a reversion was stated without attornment;

but as the attornment was a necessary ceremony to give effect to the grant, it was presumed to have been proved. He referred, also, to the case of *Buxendin v. Sharp*, (2 Salk. 662.) where the plaintiff declared, that the defendant kept a bull that used to run at men, but the *scienter* having been omitted in the declaration, it was held bad after verdict, for the action would not lie unless the owner knew of this quality in the bull; and it was not to be intended to have been proved at the trial, because it was not charged.

It appears to me, that the declaration, in the present case, is more thoroughly defective than in any of the cases which have been mentioned. It is only stated, that the defendant, *not regarding his duty as overseer, did not repair the bridge; but there is no fact charged, to show that it was his duty more than the duty of any other man. It might as well have said, that, being supervisor, or commissioner, or justice, or constable, he disregarded his duty, and suffered the bridge to remain broken. There is nothing in the statute to make it his duty to repair bridges, unless he happens to receive moneys by fines or commutation, or under the order of the commissioners, and no such fact is charged; and it being a substantive fact by itself, and not necessarily implied in the fact charged of his being an overseer, it is not to be presumed to have been proved.

The case of *Spieres v. Parker*, (1 Term Rep. 141.) is another pertinent decision on this subject. It was an action of debt under the statute of 19 G. 2. for a penalty for impressing a seaman, and the declaration contained an averment, that the seaman had not deserted from his majesty's ship *Diamond*. A motion was made in arrest of judgment after verdict, on the ground, that the declaration ought to have followed the statute, and averred, that the seaman had not before deserted from any of his majesty's ships of war. The objection prevailed, and Mr. J. Buller observed, "that nothing was to be presumed after verdict, but what was expressly stated in the declaration, or what was necessarily implied from the facts which were stated." He said he knew of no decision against that rule, and he gave a familiar instance of an exception to it, in the case of a feoffment pleaded without livery, where the livery is implied, because it was a necessary part of a feoffment. He made similar remarks in the subsequent case of *Bishop v. Hayward*, (4 Term Rep. 470.) in which he said, that "we were bound to look at the title which the plaintiff himself had stated, beyond which no presumption could be admitted. The cases of presumption are, where the plaintiff has stated a case defective in form, but not where he has shown a title defective in itself, and on the face of it."

For these reasons, as it appears to me, the declaration did not state any facts requisite to show, that the overseer was bound to repair the bridge, and that, consequently, the judgment is erroneous, even admitting that the overseer *might,

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under certain circumstances, be responsible in a private action for neglect of duty.

In either view of the case, then, whether we look to the nature of the action, or to the manner in which the party has stated his complaint, I am of opinion, the judgment is erroneous, and ought to be reversed.

January 10th.

This being the unanimous opinion of the court, it was thereupon ORDERED and ADJUDGED, that the judgment of the Supreme Court be reversed, &c.

Judgment of reversal.

CHRISTOPHER C. YATES, *plaintiff in error,*
against
WILLIAM RUSSELL, *defendant in error.*

Where a case not within the act, (1. N. R. L. 516. 3^d sess. c. 56. s. 2. 2 Rev. Stat. 384. § 39.) is referred, it seems that a judgment cannot be entered upon the report of referees; but the remedy is by attachment, on making the submission a rule [# 462] of court.

But if parties in a suit, not referable under the statute, by their written agreement expressly consent and agree, that a rule of reference be entered, and that a judgment may be entered on the report of the referees, all error is cured or taken away by this consent, and a judgment on a report of the referees, pursuant to such agreement, is as valid as if entered on a verdict.

Where, by the agreement of the parties, a cause was referred to three referees, who, or any two of them, were to report, and two only of the referees, signed the report, which stated that the subscribers having heard the proofs and allegations of the parties, find, &c. on a writ of error brought on a judgment entered on the report, it will be presumed, that all the referees met and heard the parties, though two only signed the report, nothing appearing to the contrary on the record. But if the fact were otherwise, the objection ought to be raised in the court below, on the coming in of the report, not in the court of errors, who can look only to the record.

IN ERROR to the Supreme Court. The action in the court below was brought by the defendant in error, against the plaintiff in error, for criminal conversation with the defendant's wife. The declaration was in the usual form, to which the defendant pleaded not guilty. A *venire* was awarded to try the issue joined between the parties at the *Albany* circuit, in *August* last; but before the time of trial, the parties, by an agreement in writing, mutually consented to refer the cause to three persons, named by them, as referees, who, or any two of them, should report, with all convenient speed, so that judgment may be entered thereon at the next term. In *October* term, a rule was entered in the Supreme Court, *reciting this agreement, and ordering the reference accordingly. On the 24th of *October*, the report of the referees in the cause was signed by two of the referees, which stated, that the subscribers having been appointed, by a rule of the court, referees, &c., and having heard the proofs and allegations of the parties, they were of opinion, that the plaintiff ought to recover of the defendant the sum of *three thousand dollars* damages, besides costs; and they, therefore, reported the same to be due from the defendant to the plaintiff; and on the same day, this report was filed, and a rule for final judgment thereon entered in the court below. The *record* was entered up in due form as in

cases where causes are regularly referred, by the order of the court, pursuant to the statute. A writ of error was brought by the defendant below to reverse the judgment.

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Henry, for the plaintiff in error, contended, 1. That this was not a case *referable* by statute; and that the court below would take notice of the report of referees no further than to compel a compliance with it, by an *attachment*, the reference having been made a rule of court, by consent of the parties. The report is no foundation for a judgment of the court, which is to affect the lands and tenements of the defendant, or, by an execution, to search for his goods. The party can only be attached for his contempt in refusing obedience to the rule of court. (1 *Salk.* 73. *Davila v. Almansor.* *Kyd on Awards*, 313, 314, 2d ed.)

2. The cause was referred to three referees jointly, two of whom might report. Their authority must be strictly pursued. Now it appears from the report, that the two referees only, who signed the report, *heard* the parties and decided the case. (11 *Johns. Rep.* 402. *M'Inroy v. Benedict.*) It should appear, that all the referees met together and heard the allegations and proofs of the parties; and then any two of them might have made the report. The report or award, therefore, is not pursuant to the submission.

Van Vechten, contra. 1. It is true, that this was not a reference under the statute, but at common law. The act *requires that the three referees should hear the allegations and proofs of the parties, though any two of them may decide; and in the case of *M'Inroy v. Benedict*, the court put it upon the statute. But at common law, it is sufficient that all the referees or arbitrators have due notice to meet, and if any one of them does not choose to attend, the other two may proceed to hear the parties without him. It is sufficient, then, if it appears, that all the referees had notice to attend, or were, in fact, present, though only two signed the report. This objection rests on a matter of fact, not necessary to be set forth in the report itself, but may be inquired into by the court where the reference was made. (*Kyd on Awards*, 106, 107. *Cro. Jac.* 100. 278. *Willes's Rep.* 217, 218.) The objection might have been made in the court below, and if it had been substantiated, the court would have set aside the report. For, although this is not a case to be referred under the statute, yet the parties, by their agreement, may bring it before the court, who will take notice of such agreement, and compel the parties to observe it.

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Again; the report states, that the subscribers to it heard the proofs and allegations of the parties; and it is, therefore, to be inferred, that both parties consented to a hearing before the two referees who subscribed to the report. Besides, this objec-

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tion ought to have been made in the court below, where it might have been met and repelled; and it is not to be listened to in this court. It has been said, that no judgment can be entered on such report; if so, then no writ of error can lie.

2. It is objected further, that this not being a case referable under the statute, the Supreme Court had no cognizance of it, and no judgment could be entered upon the report in that court. Was it not lawful for the parties to agree that three men, mutually chosen, should decide the controversy between them, instead of a jury? Was it not lawful, also, for the parties to agree that a judgment of the Supreme Court should be entered on the report of those referees? It can violate no rule of law or public policy. Must not the parties, then, be bound and concluded by their agreement? And does not consent take away error? If there had been no agreement between the parties to have a judgment entered, or as to the mode of enforcing the report of the referees, then the Supreme Court could only have enforced it by an attachment. The agreement being lawful, it is to have the same effect as a *cognovit actionem*. It is a case in which the maxim, *consensus tollit errorem*, applies with peculiar force. If a *venire facias* be awarded to coroners, when it ought to be to the sheriff, or the *visne* come out of a wrong place, if it be by consent of parties, and so entered of record, it will stand good. (2 *Bac. Abr.* 496. tit. *Error*, (K. 6.) Where a party who agreed, under a consolidation rule, not to bring a writ of error, it was held, that he could not bring one, though there was manifest error on the record. (*Camden v. Edie*, 1 *H. Bl. Rep.* 21.) So, executors against whom a *scire facias* is sued out to recover damages assessed on an interlocutory judgment against the testator, in his life time, cannot bring error, if the testator's attorney agreed for him, that no writ of error should be brought in that action. (*Executors of Wright v. Nutt*, 1 *Term Rep.* 388.) It is for this court to say, whether they will permit a party to bring a writ of error, in direct violation of his deliberate and solemn agreement.

Henry, in reply. This court can decide only upon the record brought before them. They cannot look beyond it, for any thing which might supply its defects. The authority given by the agreement was to three referees. It must appear from the report itself, that all three met and heard the parties; the matter cannot be helped by intendment. How is this court to know that the defendant could, by proof extrinsic to the record, show that the three referees heard the parties? This is an error in substance, and is not aided by the statute of *jeofails*.

But it is said, that the consent of the parties takes away the error. Consent of parties cannot take away or subvert the established principles of the common law. Consent cannot introduce arbitrators instead of the regular courts of justice. Consent cannot take away error where it is against a funda-

mental point of the common law. (10 *Vin. Abr.* 11. *Y. b. pl.* 4. *Godb.* 429, 430.) It is said, that *there is a consent that a judgment may be entered; not, however, as on a verdict, but in such a manner as, by the common law, the report could be enforced, that is, by an *attachment*.

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THE CHANCELLOR. The action in the Supreme Court was brought for criminal conversation with the plaintiff's wife, and after issue joined, and a *venire* awarded, the parties, by their attorneys, agreed in writing, that a rule be entered, by consent, to refer the cause to three persons named, who, or any two of them, were to report with all convenient speed, "so that judgment might be entered thereon at the then next term." The rule was accordingly entered, and two of the referees, after having heard the proofs and allegations of the parties, reported a sum in favor of the plaintiff, and judgment was entered thereon at the next term according to the consent rule.

Upon this short and plain case, a writ of error is brought, and it is alleged in support of it,

1. That the reference was in a case not within the act, and, consequently, that judgment could not be entered upon the report of the referees.

2. That the report did not warrant the judgment, even if it had been in a case within the act, because it does not appear that all the referees met, and heard the proofs and allegations of the parties.

1. There is no doubt that the case was not within the act, (a) authorizing the court with or without the consent of parties to refer certain causes to referees; but the question is, whether either party can be permitted to allege for error a rule for reference, and a judgment on the report, when the reference and the judgment were in pursuance of his own consent in writing. It was agreed by the parties, by their respective attorneys, that a rule should be entered to refer the cause to three referees, and that they, or any two of them, report with all convenient speed, so that judgment might be entered thereon at the next term. This agreement in writing, subscribed by the attorneys, was acted upon, and carried duly into effect. It is not pretended there was any imposition or collusion in the case. It was an *agreement made in good faith, and I think that good faith requires that it should be truly and accurately observed. When the agreement mentioned that judgment might be entered upon the report, it meant a regular technical judgment, as is entered in other cases upon the report of referees. The words are not susceptible of any other meaning, nor ought we to impute any other meaning to the terms, especially when they are used by professional men in the ordinary course of a suit. I am, therefore, of the opinion, that a party to that agreement must be held to be concluded by it,

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(a) 1 *N. R. L.* 516. 36 *sess. c.* 56. § 2. 2 *Rev. Stat.* 384. § 39.

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and that he cannot now allege, that the reference and judgment were not warranted by law. I think that it would be establishing a precedent that might be very pernicious in its consequences. There might be, and no doubt were, very good and sufficient reasons in the minds of the parties, for withdrawing from a public trial so painful and distressing an investigation as an action for adultery involves; and I see no good reason why the agreement of the parties to withdraw the trial from a jury to a more retired examination, before well selected referees, should be discountenanced or rejected.

The doctrine established in analogous cases, appears to warrant the entry of judgment by consent in a case like this, and I am sure that common sense does not revolt at it.

In one of the resolutions of the Court of K. B. in *Dormer's* case (6 Co. Rep. 40.) it was stated to be the law, that if twelve jurors be sworn, and one depart, another may be sworn by consent to supply his place, and 34 Edw. III. was referred to. So it was said that if the parties in a real action consent to dispense with the legal qualifications of two of the four electors of the grand assize, it was good; and the court adopted the maxim, that *consensus tollit errorem*; "and divers other cases were put," says Lord Coke, "where consent of the parties shall alter the form and course of the law." So, in *Turner v. Barnaby*, (12 Mod. 564.) the attorneys of the parties named the jurors to be returned by the sheriff, and being by consent, it was held good; and the like assent, in a like case, was held valid in 6 R. II. (*Challenge*, 102. cited in *Viner*, tit. *Error*, Z. 6. 5.) And in a writ of right, according to *Dodderidge, J.*, (*Palm. Rep.* 100.) *the parties may agree that the trial be by twelve common jurors, and not by the grand assize of sixteen jurors, which is the number established by law in that action.

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These cases, which I have referred to, are taken principally from the ancient law, and they are all cases in which the consent of parties was applied to vary the regular and established mode of trial by jury. To take another juror, without necessity, after the twelve have been sworn, or to dispense with the legal qualifications of jurors, or to allow the parties to select the jury, or to reduce the grand assize from sixteen to twelve men, is a stretch of power almost equal to the taking of three referees, instead of the twelve jurors; yet all those acts have been held good, when done by consent, and that too in ancient times, when the forms of law were adhered to with great strictness, and when the courts were not much disposed to indulge in very liberal and enlightened views of justice.

In *Hall v. Mister*, (1 Salk. 84.) it is said, that if a rule be made at *Nisi Prius*, to refer a matter to three of the jury, and that the plaintiff shall have a verdict for his security, the plaintiff may either enter up judgment on the verdict, or have an attachment for not obeying the rule of court, and this was said by the bar to be the constant practice.

The verdict, under that practice, must have been a mere matter of form, and entered by consent without proof; and yet a judgment is entered upon that verdict, and the plaintiff has his election to enforce the payment of the sum awarded by the three jurors, either by judgment and execution, or by an attachment under the rule of reference. Though two of the judges doubted in that case, yet there was no disallowance of the practice, and there is no difference in substance between that case and this. In both cases, the parties take the cause from the jury, and agree to refer it to three men; and in both cases, a judgment is entered by consent, the better to secure the sum awarded, or reported. The only difference between the cases is, that in the one in Lord *Holt's* time, the parties agree to enter a formal verdict to precede the judgment, and in this case, the parties agree that judgment may be entered upon the report as in other cases of reference. The difference is *merely nominal, and cannot vary the force and efficacy of the assent of the parties.

We are well warranted, then, under the principles and usages of the *English* law, to consider the judgment entered upon the report of the referees as valid, and that what otherwise might have been error, is cured, or taken away, by the express agreement.

The late cases in the *English* courts consider these agreements of the parties, in the progress of a cause, to be highly obligatory, and they will not suffer them to be violated. It has been repeatedly held, (*Wright v. Nutt*, 1 *Term Rep.* 388. *Camden v. Edie*, 1 *H. Bl.* 21.) that if a party agree that no writ of error shall be brought, he is bound by it, though there be manifest error; and to bring one would be acting contrary to good faith. "It is contrary to justice," said Lord *Loughborough*, "to permit the defendant to proceed in his writ of error, since he has, by his own act and consent, prevented the plaintiff from pursuing the common course of law." So, in this case, it is very probable, that the consent of the defendant to a reference, and to have judgment entered upon the report, may have prevented the plaintiff below from going on regularly to a trial, verdict and judgment. It is very possible that the stipulation to have judgment entered upon the report, was the great inducement to the consent to the rule of reference, and this consideration strikingly illustrates the danger of permitting these agreements to be disregarded, and the wisdom and policy of the old rule, of liberally recognizing the healing influence of these acts of consent. When the parties agreed that judgment might be entered on the report, they certainly must have understood each other that the judgment was not, for that cause, to be deemed erroneous.

I am, accordingly, of opinion, that the reference and report, and judgment entered thereon, being all acts founded on consent appearing upon record, are valid.

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2. But admitting the proceeding to be regular, it is next said, that it does not appear that all the referees met and heard the parties. The answer to that objection is easy and decisive. We are to presume that all the referees met, as nothing appears to gainsay it. The parties appeared before *the referees, for the report states, that their allegations and proofs were heard, and if all the referees did not assemble, the objection ought to have been raised in the Supreme Court, or been made to appear by affidavit, or a certificate of the referees, on the coming in of the report. No such objection can be raised here, for we can only look to the record, and there no such objection can be found, nor is there any fact to support it; and it probably has no foundation in fact. By the terms of the rule, any two of the referees were competent to report.

The reasons assigned in support of the writ of error are not well founded, and the judgment ought, therefore, to be affirmed.

January 10th.

This being the unanimous opinion of the court, it was thereupon ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court, in this cause, be affirmed; and that the plaintiff in error pay to the defendant in error, for his costs and charges, &c., and that the record be remitted, &c.

Judgment of affirmance. (a)

(a) Where the parties in replevin, in a court of common pleas, agreed in writing to refer the cause to B., to be determined by him, upon legal principles; and, thereupon, a rule was entered, that the cause be referred to B., to be heard and determined by him, &c., and B. made his report to the court below, on which the court gave judgment; held, that this not being a case referable under the statute, but a mere voluntary submission to the arbitrament of B., it was a discontinuance of the suit, and the court below having no jurisdiction afterwards, the judgment on the report and award, was erroneous. *Camp v. Root*, 18 *Johns. Rep.* 22. *Hopkins v. Flynn*, 7 *Cowen*, 526. *Hopkins v. Banks*, *Ibid.* 650. *Denning v. Smith*, 2 *Wendell's Rep.* 303. *Rathbone v. Lounsbury*, *Ibid.* 595. *Curtis v. Staring*, 4 *Wendell's Rep.* 198. *Stafford v. Hesketh*, 1 *Wendell's Rep.* 71. *Cleveland v. Hunter*, *Ibid.* 104. *Johnson v. Parnely*, ante, 129. *Armstrong v. Percy*, 5 *Wendell's Rep.* 535.

AARON HENRY, *plaintiff in error*,
against
 JOHN C. CUYLER, and HANNAH his wife, *defendants*
in error.

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IN ERROR to the Supreme Court. *John Maley*, by an indenture, dated the third day of *November*, 1809, demised to *Aaron Henry*, of the city of *New-York*, a house, store, *and lot of ground, with the appurtenances, at the north-east corner of *Water street* and *Beekman slip*, for a term of six years from the first day of *May*, 1810, at an annual rent of 450 dollars. The lease contained the following covenant: "and the said *Aaron Henry*, for himself, his heirs, executors, administrators, and assigns, covenants and agrees with the said *John Maley*, his heirs, executors, administrators and assigns, well and truly to pay the rent aforesaid, in the manner, and on the days for that purpose herein above expressed and appointed; and also all, and all manner of taxes, charges or assessments, which shall, or may in any wise be lawfully assessed, charged or imposed on the said demised premises, or any part thereof, or on the occupant or occupants thereof, during the continuance of the aforesaid term."

Henry entered into possession of the demised premises, and continued in possession to the end of the term.

In *May*, 1815, application was made, under the statute, by the mayor, alderman, and commonalty of the city of *New-York*, to the Supreme Court, for the appointment of commissioners to open *Fair street* into *Beekman slip*, where the premises are situated. Commissioners were, thereupon, appointed to estimate the expense of opening said street, and to make a just and equitable assessment thereof among the owners or occupants of all the houses or lots intended to be benefited by the improvement. The commissioners made and certified their estimate, which was confirmed by the Supreme Court, on the seventh of *August*, 1815. In this estimate, the premises mentioned were assessed and charged with the sum of 447 dollars 50 cents. *Henry*, the lessee, having refused to pay the assessment, *Cuyler* and his wife, (in right of his wife,) the heir at law of the lessor, *John Maley*, who died the 30th of *October*, 1812, were compelled to pay the same to the corporation of the city of *New-York*.

Under these circumstances, *Cuyler* and his wife brought an action of covenant on the lease, in the Supreme Court, against *Henry*, during the continuance of the term, the writ being returnable on the 13th of *January*, 1816. The declaration set forth all the facts above mentioned, alleging *the breach in the non-payment of the assessment of 447-dollars 50 cents.

Where the plaintiff suffered a judgment to [* 470] pass against him, by default, on demurrer, in a case involving precisely the same question which had before been argued and decided by the court in another cause, between different parties, and, by mutual consent, a case was made and brought to this court, on a writ of error; this court refused to hear the cause, and ordered the writ of error to be quashed; for no question, not considered and decided in the cause in the court below, can be heard in this court, which possesses only an appellate jurisdiction.

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To this declaration *Henry* demurred, and the plaintiffs joined in demurrer, on which there was a judgment by default for *Cuyler* and his wife, in *August* term, 1816. The damages were afterwards assessed, and final judgment entered in *October*, 1816, in favor of the plaintiff, for 586 dollars 14 cents, against *Henry*.

The above case was agreed upon by the counsel on both sides, for the purpose of bringing the question as to the construction of the covenant, (which it was supposed was decided by the Supreme Court, in the case of the *Mayor, &c. of New-York* against *Cashman*, 10 *Johns. Rep.* 96. and in *Oswald v. Gilfert*, 11 *Johns. Rep.* 443.) in review before this court.

Nov 8th, 1819.

I. Hamilton, for the plaintiff in error, moved to bring on the cause.

VAN NESS, J. The question raised in this cause was never brought before the Supreme Court for its consideration. It is true, that a similar question was decided by the Supreme Court in *January* term, 1813, in the case of *The Corporation of New-York v. Cashman*, (10 *Johns. Rep.* 96.) As judgment was entered by default on the demurrer in this cause, without argument or discussion, or any examination of the question, the judges of the Supreme Court have no reasons to assign for the judgment.

THE CHANCELLOR. This court cannot take notice of a cause which has never been brought before the court below, for its consideration and judgment, although they may have solemnly decided a similar question in some other cause. This court has jurisdiction merely to correct errors in the judgments of the Supreme Court and the Court of Chancery, in causes brought here on writs of error or by appeal. That this case has been settled and brought here by the consent of both parties, can make no difference. Though consent may take away error, it cannot give jurisdiction. In the case of *Sands v. Hildreth*, (12 *Johns. Rep.* 493.) this court, in 1815, decided, that no appeal lies from a decree *of the Court of Chancery, where the defendant did not appear at the hearing, after regular notice, but voluntarily suffered judgment to pass against him by default. The same question again arose in 1816, in the case of *Gelston v. Hoyt*, (13 *Johns. Rep.* 561. 576.) in which there was a demurrer to two of the pleas, and when the cause was called in the Supreme Court, the counsel for the defendant declined arguing the demurrer, and judgment was entered for the plaintiff, as of course. This court held, that the defendants were precluded from arguing here any questions arising on the demurrer; that to discuss and consider matters not brought before the court below, or which were abandoned by the party, would, in effect, be assuming original

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jurisdiction. In delivering my opinion in that case, I stated my reasons at large, for not taking notice of a question not discussed nor considered in the Supreme Court. I am clearly of opinion, that the writ of error in this case ought to be quashed.

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SPENCER, Ch. J., VAN NESS, J., YATES, J., PLATT, J., and WOODWORTH, J., though they declined taking any part in the decision of this particular case, expressed their opinions as to the general question of practice, and the jurisdiction of the court, in which they fully concurred with the chancellor. Their reasons were substantially the same as those stated in the case of *Gelston v. Hoyt*.

SKINNER, Senator. Every case must, and ought to, depend on its own particular circumstances. The very question which arose in this case had been, before, in two other causes, solemnly argued and decided by the Supreme Court. It would have been useless, therefore, to have attempted to argue it again in that court. It was not to be supposed that the Supreme Court would overturn a judgment which they had so lately, and so deliberately and solemnly pronounced. The question, then, is not one raised for the first time, and which the court below have not considered and adjudged. We have the judgment of that court upon it; and the reasons of that judgment are to be found in the reports of the cases which have been mentioned. I agree, that if a party, *in the first instance, will pass by the Supreme Court without presenting, for their consideration and judgment, the questions arising in a cause, he ought not to be heard in this court. But when precisely the same question has been already fully discussed and considered by the court below, though in a different cause, it seems to me to form an exception to the general rule, and I see no reason why we may not, if we think there is error in this respect, apparent on the record, a transcript of which is sent here, proceed to correct that error. The direction of the constitution, that the judges are to assign their reasons here, is not that which gives this court jurisdiction. That provision is merely for the purpose of affording light and information as to the points decided in the Supreme Court. I am of opinion, therefore, that the writ ought not to be quashed.

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P. LIVINGSTON, Senator. I concur in the general rule as laid down by the chancellor and judges; but there may be exceptions to the rule. Suppose the case of a *fine* levied, where the Supreme Court may not have any reasons for their judgment to state, is the party aggrieved to be deprived of his writ of error? In the case of *Cheetham v. Tillotson*, (5 Johns. Rep. 430. 4 Johns. Rep. 499. S. C.) a judgment was rendered by default, in the Supreme Court, in a suit for a libel, and the

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principal ground assigned for error was not raised or decided upon in that court; yet this court heard the cause, and reversed the judgment of the court below. I admit, that when the door of the Supreme Court, or of the Court of Chancery, is open to the party, and he does not choose to avail himself of the judgment of those tribunals, but, waiving all discussion of his rights there, brings his case here, to be examined in the first instance, he ought not to be heard in this court. But I think that this case is an exception.

HAMMOND, Senator, said, that this case was distinguishable from those cited, and that it ought to be heard.

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H. YATES, Senator, said, he thought the present case was an exception to the general rule. Suppose a verdict had *been found for one hundred dollars damages, on which a judgment had been entered for 1,000 dollars, and a term had elapsed, so that the Supreme Court, according to their rules of practice, would not interfere, ought the party to be remediless?

SPENCER, Ch. J., observed, that the objection now made was not raised in the case of *Cheetham v. Tillotson*.

A majority of the court (the chancellor and fifteen senators) being of opinion, that the writ of error ought to be quashed, the following judgment was entered; "It appearing to this court, from the case agreed upon by the counsel for the respective parties, that the plaintiff in error suffered judgment upon demurrer to be entered against him by default, in the court below; it is thereupon ORDERED and ADJUDGED by this court, that the writ of error in this cause be quashed, and that the plaintiff in error pay to the defendants for their costs in this court to be taxed; and it is further ordered and adjudged, that the record be remitted to the Supreme Court, to the end, that the defendants may have execution, as well for such costs, as for the damages and costs recovered in the said court, and also interest on the said judgment from the time it was rendered, to be taxed with the costs in this court."

Writ of error quashed. (a)

(a) Vide *Colden v. Knickerbacker*, 2 Cowen's Rep. 31.

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ALBANY,
January, 1820.JACKSON
V.
LEWIS.

*JAMES JACKSON, *ex dem.* JAMES BOYD, *plaintiff in error*,
against
JOHN LEWIS, *defendant in error*.

THIS was an action of ejectment, brought to recover lot No. 94, in the township of *Brutus*, in the county of *Cayuga*, in the *military tract*. For the facts of the case and the opinion of the Supreme Court, *vide* vol. 13, p. 504.

On the trial of the cause below, the jury found a verdict for the defendant; and a case was made, on which the plaintiff moved to set aside the verdict and for a new trial; and the motion was denied by the Supreme Court. The case having been turned into a special verdict, a writ of error was brought, returnable to this court.

Foot, for the plaintiff in error.

Van Vechten, for the defendant in error.

THE CHANCELLOR. In this case, the plaintiff, *Boyd*, claimed title to the military lot by a deed from *B. Wallace*, of the 16th of *September*, 1799, and the *Onondaga* commissioners awarded the title to *Wallace*, on the 29th of *August*, 1798, and he claimed under a deed from *Bevins*, the soldier, of 2d of *March*, 1796. But *Bevins*, under whom both parties claimed title, had already conveyed the premises to *Henry Hart*; on the 9th of *March*, 1784, and *Hart* died in *June*, 1787; *Herman V. Hart*, his son and only heir at law, was born the 7th of *September* 1784, and he filed his dissent to the award of the *Onondaga* commissioners on the 7th of *March*, 1808.

The lot was vacant and unsettled, until the defendant, *Lewis*, entered into possession under *Hart*, in 1812.

Hart's deed was deposited according to law on the 25th of *April*, 1795, and duly registered; *Wallace's* deed was also duly recorded in *April*, 1796.

*There is no doubt from these facts, which appear in the special verdict, that the title of *Lewis*, the defendant, and possessor of the premises under *Hart*, is the elder and better title.

The only point in the case raised for our consideration, is, whether *Hart* was not barred of his title by the award of the *Onondaga* commissioners, because he did not file his dissent to that award until two years and six months after he was of age. It seems to be admitted, that if he had filed his dissent within two years after he was of age, his title would have been secured. The only question is, whether he had two or three years to file his dissent.

By the proviso contained in the 8th section of the act to settle disputes concerning the titles to land in the county of *Onondaga*; (1 N. R. L. 215. sess. 20. ch. 51.) infants have three years after coming of age, within which to file their dissent to the award of the commissioners. (*Vide* S. C. vol. 13, p. 504.)

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The 3d section of the act creating the *Onondaga* commissioners, (sess. 20. ch. 51.) declared that their awards should be binding after two years, unless the party aggrieved, within that time, filed his dissent, and if not in possession of the land, within three years, brought his suit. The 7th section provided, that if the party dissenting was in possession, then the other party in whose favor the award was made, was to bring his suit within three years. The dissent under these two sections was to be made in two years, and the suit to be brought within three years. The act, therefore, was a new and narrow statute of limitations as applied to the military lands; and the journals of the two houses of the legislature will show, that the bill met with strong opposition by reason of the very short period of limitation given in those two sections, for filing the dissent and bringing the suit. But the case now before us arises upon the limitation in the 8th section, which is in these words—"neither this act nor any thing therein contained, shall extend or be construed to the prejudice of any person, under the age of twenty-one years, or *feme covert*, or person not of sound mind or in prison, if such infant, *feme covert*, &c. shall, *within three years after coming to the age of twenty-one years, &c., make their dissent, and bring their suit, and prosecute the same to effect as aforesaid.*"

Hart complied literally with this proviso. He did, within three years after coming to the age of twenty-one years, make his dissent, and are we at liberty to depart from the plain and express words of the act, and say that *Hart* ought within two years after coming to the age of twenty-one *years, to have made his dissent? Surely if that was the intention of the legislature, they have used words so directly contrary to that intention, as to render this section a snare to the unwary. If such had been the intention, the legislature could not well have avoided saying, in easy and natural language, that the infant and others must make their dissent and bring their suits, *within the times aforesaid*, after their disabilities were removed. In the general statute of limitation for common cases, the words are, that infants, *feme coverts*, &c. shall bring their actions "within the respective times above limited after such disability removed." But in this case and in this statute, the legislature have departed from the usual language of such a proviso, and adopted words which expressly declare a different period of limitation. They cannot be mistaken. They are so plain, that *he that runs may read them*; and I may safely say, that no person would ever have suspected, from the first perusal of these words, declaring that the infant, *within three years after coming to the age of twenty-one years, should make his dissent and bring his suit*—that it was intended he must make his dissent within two years. We are not justified in rejecting this clear and intelligible language, and in seeking for some hidden and dangerous meaning, because the section concludes

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with the words *as aforesaid*. Let us rather apply to this case the excellent sense and the unsophisticated simplicity of *Vattel*, in the rules which he gives for the interpretation of treaties: "It is not permitted," he says, (*B. 2. c. 17. s. 263.*) "to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to endeavor to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless."

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The only plausible reason which the counsel assigned for departing from the obvious sense of the section, and the downright plain language which it uses, is, that in the other sections the party, who was under no disability at the time of the award, was to file his dissent within two years. But *if the legislature thought proper to allow the period of *one year more* to those persons who had just started from infancy to manhood, or from lunacy to a sound mind, than to other persons, who has any just cause to complain, or to question the wisdom or the goodness of the law? There may be very sound reasons assigned for the difference of limitation in the two cases. The time was very short, at best, and was a most serious and unprecedented abridgment of the usual time allowed for asserting title to land. If the construction of the section was even doubtful, we ought to incline to the most benign and favorable interpretation in favor of the better title. It is not to be supposed that infants on their first coming of age, or persons of diseased understanding on their first regaining their right minds, or *feme coverts* on their first entrance upon the cares and duties of bereaved widowhood, can bestow a very prompt attention to their civil rights. The mind in such cases enters with diffidence upon a new and untried scene, and I should think that one year was no more than a reasonable indulgence of time to enable them to acquire those habits of vigilance and resolution which can put them upon a level with the experienced men of the world, and enable them to encounter, on equal terms, with skilful veterans in the animated competitions for property. The legislature of 1797 acted, therefore, in my humble opinion, with great good sense, and with an enlightened humanity, when they allowed to this class of persons the term of three years, to look into the disordered state of their military titles, to unravel the intricate webs of fraud which had obscured them, to satisfy themselves of the justice and equity of their claims, and, then, on the final result, to enter their dissent, and commence their suits.

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The reason of the law, and the words of the law, appear to me to be equally plain in favor of the construction given to it by the Supreme Court, and I am, accordingly, of opinion, that the judgment ought to be affirmed.

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ALBANY,
January, 1820.JACKSON
v.
PORT.
March 20th.

This being the unanimous opinion of the court, it was thereupon ORDERED and ADJUDGED, that the judgment of the Supreme Court, in this cause, be affirmed; and that the *plaintiff in error pay to the defendant in error, for his costs and charges, in and about his defence in this court; and it is further ordered, that the record be remitted, &c.

Judgment of affirmance.

SAMUEL JACKSON, *plaintiff in error,*
against
JOHN PORT, *defendant in error.*

B. leased a lot of ground to the plaintiff, who covenanted to pay B. the yearly rent of 32 pounds 17 shillings, in four equal payments, &c. The plaintiff, afterwards, assigned the same premises to the defendant, subject to the payment of the rent to B. &c., and the defendant covenanted with the plaintiff to perform and keep all the covenants, &c. mentioned in the lease from B. to the plaintiff. [* 480]

The defendant having suffered the rent to remain in arrear, and unpaid to B., the plaintiff brought an action against him for a breach of his covenant in not paying the rent to B. Held, that this was not a mere covenant of indemnity, but for the payment of the rent for the plaintiff to B.; that the breach was well assigned, by alleging, that the defendant had not paid the rent, &c.

A plea of *non damnificatus* is no answer to the declaration, upon an undertaking by the defendant to pay a sum of money for which the plaintiff was bound.

IN ERROR to the Supreme Court. This was an action of covenant brought by *Port* against *Jackson*. The declaration, after stating a lease of a lot of land in *Manchester*, in *England*, made by one *Thomas Barlow* to the plaintiff, for 1600 years, at the annual rent of 32 pounds 17 shillings sterling, which the plaintiff covenanted to pay to the said *T. B.* during the term, alleged, that the plaintiff, being so possessed of the said term, &c., by indenture, on the 18th of *August*, 1792, demised, granted, bargained and sold the premises to the defendant, subject to the payment of the said yearly rent to the said *T. B.*, &c., and that the defendant, in and by the said indenture, covenanted, promised, and agreed with the plaintiff, that he, the defendant, would well and truly observe, perform, fulfil, and keep all and every the covenants, conditions, provisoes, payments and agreements mentioned and contained in the first mentioned indenture, and which, on the part of the plaintiff, his executors, &c. were, or ought, thereafter to be paid, done, or performed, &c. The plaintiff then averred, that on the 25th of *March*, 1800, 832 pounds 13 shillings sterling, or the rent of 24 *years and a half, remained in arrear, and unpaid to the said *T. B.*, and that the defendant, although often requested, had refused, and still refused, to pay the said sum of 832 pounds 13 shillings, which still is wholly due in arrear, and unpaid to the said *T. B.* &c. *Vide S. C. ante*, p. 239—247, for the pleas of the defendant, to which the plaintiff demurred. The court gave judgment for the plaintiff below, on which the defendant brought a writ of error to this court.

T. A. Emmet, for the plaintiff in error, contended, that a good and sufficient breach of the covenant was not assigned in the

declaration. (*Comyn's Dig. Pleader*, C. 44. 6 *Johns. Rep.* 49.) That this was a covenant of indemnity, that is, to save the defendant in error harmless from his covenant to pay rent to *Barlow*. If taken strictly as a covenant to pay the rent, then it must be paid at the day; and if not so paid, the plaintiff in error would be liable on his covenant, although the rent may have, in fact, been paid by the ter-tenant to the chief landlord, before suit brought. The chief landlord has a good right of action against the ter-tenant for the rent, by privity of estate. The good sense, and reasonable construction of the covenant, then, is, that *Jackson* will save *Port* harmless from the payment of any rent. The declaration, therefore, should have alleged, that *P.* had paid the rent. (3 *Comyn's Dig.* tit. *Condition*, (I.) 1 *Roll. Abr.* (M.) *Covenant*, E. 3. *Bac. Abr.* tit. *Covenant*, 1.) Though a plea of *non damnificatus* would not be good to this declaration, yet, if the breach had been properly assigned in the declaration, it would be a good plea. (5 *Comyn's Dig. Pleader*, 2 *W.* 33.)

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A. Paine, and *J. Paine*, contra, insisted, that this was a covenant to pay the rent, and not a covenant to indemnify. They cited 1 *Chitty Pl.* 326. 331. *Com. Dig. Pleader*, C. 45. C. 46. 5 *Johns. Rep.* 168. 8 *Johns. Rep.* 111. 7 *Johns. Rep.* 376.

THE CHANCELLOR. The question before us arises upon a few plain facts.

**Thomas Barlow*, on the 19th of *May*, 1791, leased to *John Port* a lot of land in *Manchester*, in *England* for 1600 years, at an annual rent of 32 pounds 17 shillings sterling, payable quarter yearly; and *Port* covenanted to pay the rent during the continuance of the term, in time and manner aforesaid. Afterwards, on the 18th of *August*, 1792, *Port* sold and assigned the lot to *Jackson*, the present plaintiff in error, subject to the payment of the said rent, and *Jackson* covenanted with *Port*, that he (*Jackson*) would perform and keep all the covenants mentioned and contained in the original lease, and which, on the part of *Port*, were to be paid and performed. The plaintiff then avers, that a rent of 832 pounds 13 shillings sterling, for the preceding 24 years, was in arrear, and due, and unpaid to *Barlow*, and that *Jackson* had, accordingly, broken his covenant.

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The only question in the case, as the counsel for the plaintiff in error admits, is, whether a good and sufficient breach of the covenant has been assigned. We have nothing to do with the question what damages ought to have been recovered under the issue which was joined. That is not a point which has, or which could have been raised here upon this record. We have only to answer the question, Has a sufficient cause of action been stated in the declaration?

I wish I had been able to discover good ground in law for answering this question according to the wishes of the plaintiff

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in error, for I perceive that he has rashly entered into a covenant which is to endure for ages, and which must be to him as if "a millstone were hanged about his neck." The case further shows, that the dreams and the madness of speculation is a disease which has prevailed on each side of the *Atlantic*.

He covenants to keep and perform all the covenants which *Port* had made to *Barlow*, and which, on the part of *Port*, were to be "paid, done and performed," and one of these covenants was to pay the rent. *Jackson's* covenant was, therefore, not a mere covenant of indemnity. It was, in substance and effect, that he would pay that rent for *Port*, and the averment is, that he has not paid the rent, and that it is in arrear, and due. The breach, if not in the very *words of the covenant, is according to its sense and meaning, and such an assignment has always been held sufficient. (*Com. Dig. tit. Pleader, C. 45, 46.*) Where a defendant has undertaken to do an act in discharge of the plaintiff from such a bond or covenant, he must show, specially, matter of performance, and this *Jackson* ought to have shown in this case; but where the defendant has undertaken to acquit and discharge the plaintiff from any damages by reason of his bond or covenant, he then merely undertakes to indemnify and save harmless, and the plaintiff is then bound to show his damages. This was the distinction stated in the case of *Harris v. Pett*, (*Carth. 374. 5 Mod. 243.*) and it is a well settled distinction; and in my humble opinion we should pervert the plain sense and language of the covenant entered into by *Jackson*, if we should turn it into a mere covenant to indemnify *Port*, when it was evidently a covenant to pay the rent for, and instead of *Port*. *Port* was not bound to go and pay the rent, or have it recovered from him by due course of law, before he could resort to *Jackson*. He was not bound to subject himself to such previous distress or inconvenience. *Jackson* had undertaken to keep his covenant for him, that is, to go and pay the rent as it from time to time became due. If *Jackson* suffers the rent to be previously collected from *Port*, that would surely not be keeping and performing *Port's* covenant, as he had engaged to do. I cannot raise a doubt in my mind as to the construction of the covenant.

The case of *Atkinson v. Coatsworth*, (*8 Mod. 33. Str. 512.*) is very analogous. One *S.* demised lands to the plaintiff for a term of years, and the plaintiff made an under lease to the defendant, who covenanted "to perform and keep all the covenants in the original lease to be kept and performed by the plaintiff." The rent reserved in the original lease not being paid, the plaintiff sued the defendant, and assigned for breach the non-payment of rent to the original lessor. The cases so far are exactly alike. The covenants were the same, and the breach was the same. In that case, as here, the plaintiff had a verdict, and error was brought into the K. B., but the error assigned was one altogether different from the

one assigned here, and with which *we have no concern, and the judgment was nevertheless affirmed. It is so far a case in point, that if the breach in the present case be not well assigned, the breach in that case was also not well assigned, and yet no such suggestion of error was thought of in that case, as has been made in this. It did not occur to so learned and experienced a counsellor as Mr. *Bootle*, who argued that case for the plaintiff in error. I cannot but be of opinion, that the hardship of the case before us, and the sympathy it naturally excites, has taxed the ingenuity of the learned counsel, and suggested a distinction for our consideration which does not belong to the case, and is altogether repugnant to the sense and language of the covenant.

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I might here, also, refer to the case of *Holmes v. Rhodes*, (1 *Bos. & Pull.* 638.) in which it was held, that the plea of *non damnificatus* was no answer to an undertaking by the defendant to pay a sum, for which the plaintiff was bound. But I forbear to press the cause further. I only wished to say just so much as I feel it my indispensable duty to say, when called upon for the opinion which I now give, that the judgment of the Supreme Court ought to be affirmed.

This being the unanimous opinion of the court, it was thereupon ORDERED and ADJUDGED, that the judgment of the Supreme Court, in this cause, be affirmed; and that the plaintiff in error pay to the defendant in error, two hundred and ninety-seven dollars and thirty-seven cents, for his costs and charges in and about his defence in this court; and that the record be remitted, &c.

March 20th.

Judgment of affirmance. (a)

(a) See *Port v. Jackson*, ante, 239.

*PETER BROOKS, JUN., *plaintiff in error*,
against
ABIJAH HUNT, *defendant in error*.

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IN ERROR to the Supreme Court. *Hunt* recovered a judgment against *Brooks* in the Supreme Court, in an action of covenant, for 4,773 dollars and 46 cents. The record was filed and judgment docketed the 29th of *August*, 1804. A *test. fi. fa.* was issued to the sheriff of *Montgomery* county, who collected of the goods and chattels of the defendant, 64 dollars and 76 cents.

A writ of error will not lie upon the order or decision of the Supreme Court on a motion made to set aside an execution.

But even if error would lie in such a case, yet if the plaintiff in error has applied for and obtained a writ of *audita querela*, it is a waiver of his right to bring a writ of error; for *audita querela* is a regular suit, in which the parties may plead and take issue on the merits; and upon the judgment of the Supreme Court thereon, a writ of error may be brought to this court.

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In 1805, a *ca. sa.* was issued for the residue, on which the defendant was taken and imprisoned from that time until June, 1808, when he was discharged from imprisonment, by the Court of C. P. of *M.*, under the "act for the relief of debtors with respect to the imprisonment of their persons," passed the 24th of March, 1801, (sess. 24. ch. 66. s. 4, 5. 7.) and the "act for giving relief in cases of insolvency, for the bailing of prisoners, and for other purposes," passed the 8th of April, 1808, (sess. 31. ch. 163. s. 7, 8, and *vid.* 1 *N. R. L.* 348. 2 *Rev. Stat.* 16, &c.) which provided that a debtor so discharged should not, afterwards, be arrested or imprisoned for the same debt, but "the judgment should remain in force, and execution might, at any time, be taken out thereon against the goods and chattels, lands and tenements, of such debtors, (necessary wearing apparel and bedding for him and his family, and the tools of his trade, excepted,) as if he had never before been charged in execution and released from prison." All the real and personal property of *B.* was assigned, by order of the Court of C. P. to *Henry F. Yates*, for the use of the plaintiff, &c. On the 2d of December, 1811, *B.* being impleaded in certain suits, within the meaning of the "act for the benefit of insolvent debtors and their creditors," passed the 3d of April, 1811, (sess. 34. ch. 123.) presented his petition to the first judge of *Montgomery* county, pursuant to the act, and having complied with all things required by the act, was, on the 7th of February, 1812, by a certificate under the *hand and seal of the judge, discharged from all his debts. On the 1st of March, 1819, *Hunt* caused an *alias test. fi. fa.* to be issued against the property of *Brooks*, founded on the former judgment, and on the provisions contained in the acts of 1801 and 1808, as above stated.

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In the last *May* term, *Brooks* moved the Supreme Court to set aside the *alias test. fi. fa.* on the ground of his discharge from all his debts, under the act of 3d of April, 1811. The S. C., after taking time to advise until *August* term last, denied the motion, with costs, (*vide Mather v. Bush*, 16 *Johns. Rep.* 233—256. *Roosevelt v. Cebra*, ante, p. 108.) on the ground that the case could not be distinguished from that of *Sturges v. Crowninshield*, (4 *Wheat. Rep.* 122.) in which the Supreme Court of the United States decided that the act of the 3d of April, 1811, so far as it discharged the debtor from all liability for previous debts, was an act impairing the obligation of contracts, within the meaning of the constitution of the United States, and, therefore, void.

In *October* term last, *Brooks* again moved to set aside the *alias test. fi. fa.*, and for leave to issue an *audita querela*. The court below granted the motion for the *audita querela*, but said that it should not operate as a *supersedeas* to the execution.

On the denial of the motion in *August* term, *Brooks* caused a *record* to be made up and signed and filed in the Supreme Court, which contained the notice of the motion

made in *May* term to set aside the execution, and the affidavits on which it was founded and resisted, and the order of the court thereon; and upon that record brought a writ of error to this court. On filing the return to the writ of error, the defendant in error alleged *diminution*, and obtained a *certiorari*, to which was returned copies of the notice, affidavits, &c., on a motion for the amendment of the execution, which had been granted in *August* term, on payment of costs.

The *chief justice* having assigned the reasons for the order of the court below,

Henry, for the defendant in error, moved to quash the writ of error, on the ground that a writ of error would not lie on such an interlocutory proceeding or order of the *Supreme Court, on a special motion; and, also, that the plaintiff in error, by applying for his remedy by *audita querela*, had waived his right to a writ of error, admitting even that he was entitled to it.

The court said, they would reserve the question on this motion, and directed the counsel to proceed and argue the cause, in connection with it, on the merits of the case, as they appeared on the record.

As the court decided that the writ of error should be quashed, it is unnecessary to state the arguments of counsel, on the merits.

Oakley, (*Attorney General*), and *S. Jones, jun.*, for the plaintiff in error, cited *Clason v. Shotwell*, (12 *Johns. Rep.* 31.) to show that a writ of error would lie in this case.

Henry, in reply, said, that this being a mere interlocutory order or proceeding, came within the very distinction taken and adopted by this court, in the case of *Clason v. Shotwell*, between a final determination of a cause on its merits, and an interlocutory order of the court.

THE CHANCELLOR. There are two points raised upon the preliminary motion to quash the writ of error: 1. Will a writ of error lie in this case? 2. Assuming it to lie, has not the plaintiff in error, *Brooks*, waived that remedy, by subsequently applying to the Supreme Court for leave to sue out an *audita querela*?

1. I am of opinion, upon the first point, that the writ of error ought to be quashed. The rule or order of the Supreme Court, denying *Brooks's* motion, was not a *judgment*, within the meaning of the constitution, or of the statute organizing this court. It was only a decision upon a collateral or interlocutory point, and cannot well be distinguished from a

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variety of other special motions and orders which are made in the progress of a suit, and which have never been deemed the foundation of a writ of error. A writ of error, according to the uniform language and understanding of the law, will lie only upon a final judgment or determination *of a cause, and it never was known to lie upon a motion to set aside process.

2. But if error could be brought upon such a motion, the plaintiff in error has waived all right to it in this instance, by his subsequent application to the Supreme Court for an *audita querela*. That writ has been granted to him, and it is a regular suit, in which the plaintiff in error can set up his discharge, under the insolvent act of 1811, in bar of the execution. The parties can plead and take issue either in law or fact, upon the merits and legality of the discharge; and a regular judgment must be pronounced in the Supreme Court, upon which error can be brought into this court, and from here into the Supreme Court of the *United States*, if the case should require it. I cannot conceive of a more decided case of a waiver of the first motion, and of the rule of the Supreme Court upon it, than this renewed application to the same court for the writ of *audita querela*. It is not an uncommon thing for a court of law, if the case be difficult or dubious, to refuse to relieve a party after judgment and execution in a summary way by motion, and to put him to his *audita querela*. Cases to this effect were stated by Lord *Holt*; and the Supreme Court, in 1801, in the case of *Wardell v. Eden*, (cited in 1 *Johnson's Rep.* 531, note,) adopted this course. And surely, after the decision of the Supreme Court of the *United States*, the Supreme Court acted with great discretion in denying relief to *Brooks* upon motion, and afterwards granting him, as a matter of right, his writ of *audita querela*. If ever the case touching the right of *Hunt* to his execution, notwithstanding *Brooks's* discharge under the act of 1814, is to be carried up from this court to the Supreme Court of the *United States*, I should hope, for the credit of our practice, it might be on the *audita querela*, and not upon such a strange mode of proceeding as that of a writ of error brought upon a motion and affidavit.

The rest of the court (HAMMOND and M'MARTIN, *Senators*, dissenting) being of the same opinion, it was, therefore, ORDERED and ADJUDGED, that the writ of error in this cause be quashed, &c.

Writ quashed.

*THOMAS GIBBONS, *appellant*,
against
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APPEAL from the Court of Chancery. *Aaron Ogden* filed his bill in the Court of Chancery on the 21st of *October*, 1818, against *Thomas Gibbons*, stating that on the 19th of *March*, 1787, the legislature granted to *John Fitch* the exclusive right of using, for a limited time, a steam-boat, &c. That on the 27th of *March*, 1788, the legislature repealed the act so made in favor of *Fitch*, and passed an act granting a similar right to *Robert R. Livingston* for twenty years; and on the 5th of *April*, 1803, granted the like right to *Robert R. Livingston*, and *Robert Fulton*, for twenty years. That on the 6th of *April*, 1807, the legislature passed another act in favor of *L.* and *F.* extending the time for giving the proof required by the former act. That on the 11th of *April*, 1808, *L.* and *F.* having given the requisite proof of their having built a boat impelled by steam at the rate of more than four miles an hour, &c. the legislature passed another act, giving to *L.* and *F.* and their associates, an extension of five years of the exclusive right to navigate the waters of this state, by boats or vessels moved by steam, for every additional boat which they might build, so that the whole term should not exceed thirty years from the time of passing that act; and declaring that no person or persons, without their licenses, should set in motion, or navigate, upon the waters of this state, or within the jurisdiction thereof, any boat or vessel moved by steam or fire, under the penalty of forfeiting to the said *L.* and *F.*, and their associates, such boat or vessel, &c. That, by another act, passed the 9th of *April*, 1811, it was declared, among other things, that the several forfeitures mentioned in the act of the 11th of *April*, 1808, should be deemed to accrue on the day on which any boat moved by steam or fire, not navigating under the license of *L.* and *F.* or their associates, shall navigate any of the waters of this state, or *those within its jurisdiction, in contravention of the said act, and that *L.* and *F.* and their associates, might thereupon have the same remedy in law and equity, to recover such boats, &c. as if the same had been wrongfully taken out of their possession, &c. The bill further stated, that the said *L.* and *F.* having, in all things, complied with, and fulfilled the terms and conditions expressed in the said laws, became entitled to the exclusive right and privilege to navigate the waters of this state, by boats moved by steam or fire. That on the 20th of *August*, 1808, *R. R. L.* and *F.*, by indenture, granted to *John R. Livingston* and his assigns, "all the right which the said *R. R. L.* and *F.* possessed under

The several acts of the legislature of this state, granting and securing to certain persons, the sole and exclusive right of using and navigating boats or vessels, by steam or fire, in the waters of this state, for a certain term of years, are constitutional and valid acts; and an injunction may be issued by the Court of Chancery to restrain the citizens of another state from navigating the waters of this state by vessels propelled by steam, although such vessels may have been duly enrolled and licensed, under the laws of the United States, as coasting vessels.

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the laws of the state, exclusively to navigate from any place within the city of *New-York*, lying to the south of the state prison, to certain places in the said indenture specified, and lying to the south of *Powles-Hook ferry*, and particularly to *Staten Island*, *Elizabeth-town Point*, *Perth*, and *South Amboy*, and the river *Raritan up to New-Brunswick*, &c. That on the 5th of *May*, 1815, *J. R. L.* by articles of agreement, agreed to permit the plaintiff to run a steam-boat or steam-boats, between *Elizabeth-town Point* and the city of *New-York* for ten years, from the first of *March*, 1815, in as full and ample a manner as he, the said *J. R. L.* had then a right to run the same by virtue of the grant to him from *R. R. L.* and *R. F.*; and that the said *J. R. L.* further agreed with the plaintiff, that he would not run, nor grant any license to run a boat or boats, during the ten years, to and from *Elizabeth-town*, and *Elizabeth-town Point*. That *R. R. L.* died in *February*, 1813, and *R. F.*, in *March*, 1815, and that the legal representatives of *R. R. L.* and *R. F.*, on the 29th of *December*, 1815, covenanted with the plaintiff and *Thomas Morris*, among other things, to release and confirm to the present owners, or their assigns, of any steam-boat or boats, run by them, or any of them, on the *Hudson* river, on the sound between *New-York Island* and *Long Island*, or between *New-York* and *Elizabeth-town Point*, or *Elizabeth-town*, to the whole extent of the township, all their right, title, or titles respectively, to every patent or other right holden by them, &c. That when this last mentioned deed was executed, the plaintiff was owner of a steam-boat then running on the waters of the state between *New-York* and *Elizabeth-town Point*, or *Elizabeth-town*; and the plaintiff claimed the exclusive right of navigating the waters of the state of *New-York* by boats moved by steam or fire, between *New-York* and *Elizabeth-town*, in virtue of the two deeds last mentioned. That the plaintiff has lately built, and runs a steam-boat called the *Atalanta*, by virtue of his said exclusive right, between *Elizabeth-town Point* and the city of *New-York*. That the defendant, *T. Gibbons*, of *Elizabeth-town*, in the state of *New-Jersey*, is owner of two boats impelled by steam, one called the *Stoudinger*, and the other the *Bellona*; and in contravention of the exclusive right and privilege of the plaintiff, and without any license from the plaintiff, or *R. R. L.* and *R. F.*, or their representatives, the defendant had set in motion the said two boats moved by steam or fire, and employed them in the transportation of passengers between the city of *New-York* and *Elizabeth-town*, and that those boats now actually navigate between *New-York* and *Elizabeth-town*, &c., to the great loss and prejudice of the plaintiff. Prayer for an injunction to restrain the defendant, his agents, &c. from using, employing, and navigating the said two steam-boats, or either of them, or any other steam-boat by him purchased or built, as aforesaid, on the waters of this state lying between *Elizabeth-town*, or

any place within the bounds of the township, and the city of *New-York*, &c. A writ of injunction was granted on the 21st of *October*, 1818, according to the prayer of the bill.

On the 19th of *August*, 1819, the defendant filed his answer to the bill, in which he admitted the several acts of the legislature, and the deeds, &c. set forth in the plaintiff's bill, but denied the exclusive right claimed by the plaintiff under them. He admitted, that he was the owner of the two steam-boats described in the bill, and which were intended to navigate by steam between the city of *New-York*, and the wharf of the defendant in *New-Jersey*, at a place usually called *Halsted's Point*, which is within the bounds of the township of *Elizabeth-town*, but separated from *Elizabeth-town Point*, by a large and navigable creek; that the *said boats did run between *New-York* and the said wharf of the defendant, which is a short distance from *Elizabeth-town Point*, the place from which the plaintiff's boat runs to *New-York*; and that the said boats of the defendant continued so to run, &c. until restrained by the injunction issued in this cause. But he denied that the said boats ever run from *Elizabeth-town Point*. The defendant averred, that his two boats are vessels above the burthen of twenty tons, and were duly enrolled and licensed under the laws of the *United States*, to be employed in carrying on the coasting trade, according to the laws of the *United States*. That the *Stoudinger* was enrolled at *Perth Amboy*, in *New-Jersey*, on the 23d of *October*, 1817, and licensed for one year, which license was renewed on the 20th of *October*, 1818, for one year, by the collector of the port of *Perth Amboy*, in the form prescribed by law, in pursuance of an act of Congress, entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted that the *Stoudinger*, under this license, may be lawfully employed and navigated in the coasting trade between parts of the same state, or of different states, and cannot be excluded or restricted therein by any law or grant of any particular state, on any pretence to an exclusive right to navigate the waters of any particular state by steam-boats, &c. That the steam-boat *Bellona* was in like manner enrolled and licensed on the 20th of *October*, 1818, &c. That the representatives of *R. R. L. and F.*, claiming to be entitled to certain patent rights for improvements in steam navigation, and, also, an exclusive right to navigate the waters of the state of *New-York*, with boats or vessels propelled by steam or fire, on the 14th of *September*, 1816, by deed, sold to *D. D. Tompkins, Adam Brown and Noah Brown*, and their assigns, "the right, liberty, and privilege of navigating, for all purposes whatsoever, boats or vessels of all kinds whatsoever propelled by the force of fire or steam, upon, over, and across the waters of the bay of *New-York*, *Staten Island* sound, the outward harbor, including *Prince's*

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and *Gravesend* bays, and a part of the *Atlantic* ocean, and *Jamaica* bay; and, also, a right, privilege and liberty, with all *such boats so propelled, to touch, stop, and land passengers, and discharge cargoes, to depart from, and arrive at the city of *New-York*, or any part thereof; and, also, the sole and exclusive right, privilege and liberty of navigating, with all such boats to and from the city of *New-York*, and to and from the points and places in the said deed particularly mentioned and specified, to wit: "*Shrewsbury Bay* and rivers in *New-Jersey*, *Sandy Hook*, *Spermaceti Cove*, and the waters and shores adjacent thereto, to the southward of *Sandy Hook*, *Fort Diamond*, and the shores of *Long Island*, with liberty to touch at any point or place on the easterly and southerly side of *Staten Island*, and any point on the said shores, at which the grantors may lawfully touch, consistently with their grants to others." That *Adam Brown* afterwards died, and his executors, on the 4th of *December*, 1818, by a deed, reciting that all the rights and privileges under the last mentioned deed, had been released to *D. D. Tompkins*, and as respected *Shrewsbury*, and all the shores of *Shrewsbury bay* and rivers, to *Noah Brown*; and they, the said executors of *A. B.*, sold to the defendant and his assigns, all the rest, residue and remainder of the right of *A. B.*, derived under the said deed of the 14th of *September*, 1816. That *D. D. Tompkins* and *Noah Brown*, on the 7th of *December*, 1818, by deed, sold and conveyed to the defendant a right of navigating with steam-boats, upon, over, and across the waters of the bay of *New-York*, *Staten Island sound*, the outward harbor, the *Atlantic ocean*, and all the waters specified in the deed of the representatives of *R. R. L.* and *F.* to them, and to touch and land passengers, and take or discharge cargoes, and to depart from, and arrive at, and navigate to, from, and between the city of *New-York*, or any part thereof, and to, from, and between any place or places, point or points whatsoever, in the state of *New-York*, or in the state of *New-Jersey*, or elsewhere, other than, and except *Staten Island*, and all the points and places on the shores of the state of *New-Jersey*, between the point of *Sandy Hook* and the east end of the division line between *Monmouth* and *Middlesex* counties in the state of *New-Jersey*." And the defendant insisted, that if *R. R. L.* and *F.*, or either of them, had any exclusive right to navigate by *steam-boats, (which, however, the defendant did not admit) he, the defendant, had a right, under the deeds above mentioned, to navigate the waters of the state of *New-York*, between the city of *New-York* and *Elizabeth-town*, or *Elizabeth-town Point*, or any place or point in the creek called *Elizabeth-town Creek*, in the township of *Elizabeth-town*, in the state of *New-Jersey*, with boats or vessels moved by steam or fire. And the defendant denied the right of the plaintiff, if the matters set forth in his bill were true, to prosecute alone, as, by his own showing, he

was assignee of a *part* only of the exclusive right claimed by him; and he prayed that he might have the benefit of this defence, equally as if he had demurred to the bill, or pleaded it.

On this answer, the defendant below moved to dissolve the injunction, which motion, after being argued by counsel, was denied by the chancellor; who, on the 6th of *October*, 1819, made the following order: "It is ordered and decreed, that the motion be denied, and that the question of costs upon the said motion be reserved; and it is further ordered and decreed, that the injunction heretofore issued in this cause, be confirmed in its operation to the whole of the waters in the bay of *New-York*, on the passage or route between the city of *New-York* and *Elizabeth-town Point*, or *Elizabeth-town*, or any part thereof, and that it be understood not to apply to the waters of the sound that lie between *Staten Island* and the state of *New-Jersey*, so long as the boat or boats of the defendant do not enter the bay of *New-York*."

From this order the defendant below appealed to this court.

The CHANCELLOR assigned his reasons for the decretal order made by him, as follows: The motion to dissolve the injunction was founded upon the matter contained in the answer.

The defendant set up two grounds of right to navigate with steam-boats between the city of *New-York*, and *Halsted's Point*, within the township of *Elizabeth-town*, in *New-Jersey*: (1) A license to carry on the coasting trade *granted under the laws of the *United States*, and (2) a license under the representatives of *Livingston* and *Fulton*.

1. The act of Congress (passed 18th *February*, 1793, ch. 8.) referred to in the answer, provides for the *enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries*. Without being enrolled and licensed, they are not entitled to the privileges of *American* vessels, but must pay the same fees and tonnage as foreign vessels, and if they have on board articles of foreign growth or manufacture, or distilled spirits, they are liable to forfeiture. I do not perceive that this act confers any right incompatible with an exclusive right, in *Livingston* and *Fulton*, to navigate steam-boats upon the waters of this state; the right of the legislature to pass the laws mentioned in the pleadings, was not attempted to be made a question of, upon the motion before me. That right has been settled (as far as the courts of this state can settle it) by the decision of the Court of Errors, in *Livingston v. Van Ingen*, (9 *Johnson*, 507.) and if those laws are to be deemed, in the first instance, and *per se*, valid and constitutional, and as conferring valid legal rights, a coasting license cannot surely have any effect in controlling their operation. The act of

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Congress referred to never meant to determine the right of property, or the use or enjoyment of it, under the laws of the states. Any person in the assumed character of owner, may obtain the enrolment and license required, but it will still remain for the laws and courts of the several states to determine the right and title of such assumed owner, or of some other person, to navigate the vessel. The license only gives to the vessel an *American* character, while the right of the individual procuring the license to use the vessel as against another individual setting up a distinct and exclusive right, remains precisely as it did before. It is neither enlarged nor diminished by means of the license; the act of the collector does not decide the right of property. He has no jurisdiction over such a question. Nor do I think it would alter the case, in respect to the force and effect of the laws before us, if the license of the collector was evidence of property. However unquestionable the right and title to a specific chattel may be, *and from whatever source that title *may be derived*, the use and employment of it must, as a general rule, be subject to the laws and regulations of the state. If an individual be, for instance, in possession of any duly patented vehicle, or machine, or vessel, or medicine, or book, must not such property be held, used, and enjoyed, subject to the general laws of the land, such as laws establishing turnpike roads and toll bridges, or the exclusive right to a ferry, or laws for preventing and removing nuisances? Must it not be subject to all other regulations touching the use and employment of property, which the legislature of the state may deem just and expedient? It appears to me that these questions must be answered in the affirmative. The only limitation upon such a general discretion and power of control, is the occurrence of the case when the exercise of it would impede or defeat the operation of some lawful measure, or be absolutely repugnant to some constitutional law of the Union. When laws become repugnant to each other, the supreme or paramount law must and will prevail. There can be no doubt of the fitness and necessity of this result, in every mind that entertains a just sense of its duty and loyalty. Suppose there was a provision in the act of Congress that all vessels, duly licensed, should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable bays, harbors, rivers and lakes within the several states, any law of the states creating particular privileges as to any particular class of vessels to the contrary notwithstanding, the only question that could arise in such a case would be, whether the law was constitutional. If that was to be granted or decided in favor of the validity of the law, it would certainly, in all courts and places, overrule and set aside the state grant. But at present we have no such case, and there is no ground to infer any such supremacy or intention from the act regulating the coasting trade. There is no collision between the act of Con-

gress and the acts of this state creating the steam-boat monopoly. The one requires all vessels to be licensed, to entitle them to the privileges of *American* vessels, and the others confer on particular individuals the exclusive right to navigate steam-boats, without, however, interfering *with or questioning the requisition of the license. The license is admitted to be as essential to these boats as to any others. The only question is, Who is entitled to take and enjoy the license? The suggestion that the laws of the two governments are repugnant to each other upon this point appears to be new, and without any foundation. The acts granting exclusive privileges to *Livingston* and *Fulton* were all passed subsequent to the act of Congress; and it must have struck every one, at the time, to have been perfectly idle to pass such laws, conferring such privileges, if a coasting license, which was to be obtained as a matter of course, and with as much facility as the flag of the *United States* could be procured and hoisted, was sufficient to interpose and annihilate the force and authority of those laws. If the state laws were not absolutely null and void from the beginning, they require a greater power than a simple coasting license, to disarm them. We must be permitted to require, at least, the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that

*Neptunus muros, magnoque emota tridenti
Fundamenta quatit.*

2. If the appellant has any right to navigate his steam-boats upon the waters of the state, he must have derived it under the representatives of *Livingston* and *Fulton*. But the grant he sets up was subsequent to the deed from *L.* and *F.* to *John R. Livingston*, under whom the respondent holds his title; and if the pretensions of the respondent under that deed are well founded, the appellant fails in his defence.

The deed to *John R. Livingston* conveys "all the right which *L.* and *F.* possessed, exclusively to navigate with steam-boats from the city of *New-York*, south of the state prison, to *Staten Island*, *Elizabeth-town Point*, *Perth* and *South Amboy*, and the river *Raritan* up to *New-Brunswick*." The appellant says, that *Halsted's Point* (between which and the city of *New-York* his boats navigate) is "within the township of *Elizabeth-town*, but separated from *Elizabeth-town *Point* by a large and navigable creek." "That his wharf at *Halsted's Point* is within a short distance of *Elizabeth-town Point*," and yet he denies that he is sailing within the limits of the grant to *J. R. L.* Whoever is acquainted with the position of the land and waters at and adjoining *Elizabeth-town Point*, or will cast his eye upon a map of that country, will at once perceive, that

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upon the appellant's construction of the deed to *J. R. L.*, the the grant to him was vain and illusory, as a beneficial exclusive privilege. If *L.* and *F.*, notwithstanding that deed, retained in themselves the right to run steam-boats to and from *Elizabeth-town* and *New-York*, by starting from the opposite side of the small creek that runs at *Elizabeth-town Point* into the bay or sound, the right in *J. R. L.* was, in effect, no longer exclusive, but common. This is certainly not the sound construction of the deed, which gave him the right to navigate *exclusively* within its prescribed limits. It is to be so construed as to have value and effect as an exclusive right. For this purpose, *Elizabeth-town Point* must be considered as including the whole shore or navigable part of *Elizabeth-town*; and this appears to be the clear and necessary interpretation of the grant, when we take into consideration the situation of the ground and waters, and the nature and object of the grant. Any narrower construction in favor of the grantors would render the deed a fraud upon the grantee. It would be like granting an exclusive right of ferriage between two given points, and then setting up a rival ferry within a few rods of those very points, and within the same course and line of travel. The common law contained principles applicable to this very case, dictated by a sounder judgment and a more enlightened morality. If one had a ferry by prescription, and another erected a ferry so near it as to draw away its custom, it was a nuisance for which the injured party had his remedy by action. (*Bro. action sur le case*, pl. 57. tit. *Nuisance*, pl. 12. 2 *Roll. Abr.* 140. pl. 20. 3 *Black. Com.* 219.) The same law and remedy were applied to the case of a fair or market, in which an individual had a freehold interest, if another fair or market was erected, and used, within its vicinity. (*F. N. B.* 184, and notes. 2 *Roll. Abr.* 140. pl. 1, 2, 3. *Yard v. Ford*, 2 *Saund.* *172.) The same rule applies, in its spirit and substance, to all exclusive grants and monopolies. The grant must be so construed as to give it due effect, by excluding all contiguous and injurious competition.

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The grant of an exclusive right to run steam-boats between *New-York* and *Elizabeth-town Point*, was intended to comprehend the entire benefit of all the travelling, and passengers going to and from *Elizabeth-town* and *New-York*. It meant to embrace the whole stream of intercourse between these two places, and *Elizabeth-town Point* was used for the landing place of the town. No other landing place occurred to the parties, or it doubtless would have been inserted. The intention of the instrument is clear and palpable. It is to be deduced from the general description, and the nature of the grant as an exclusive privilege, and the particular locality of the land and waters in question. Any other construction is unreasonable, and incompatible with the object of the grant, and with the principles of the common law applicable to the

case. An exclusive right to navigate with steam-boats between the city of *New-York* and *Elizabeth-town Point*, includes in it the use of the waters on the usual passage between those *termini*, in exclusion of the use of those waters on such a passage or route, by any other steam-boat. It is like the grant of an exclusive right of way, and no stranger has a right to use it. (*Finch's Law*, 31.)

In the subsequent grant from *J. R. L.* to the respondent, the existence of his right under the deed of 1808, to the entire navigation between *New-York* and *Elizabeth-town*, as well as *Elizabeth-town Point*, was assumed. It was also provided, that an exclusive grant to navigate to the latter place, should exclude any interfering navigation to the other. There was an interval of seven years between the deed of 1808 and this latter deed, in all which time we are led to infer that *J. R. L.* had enjoyed the exclusive right under his deed to the extent now set up by the respondent, and that both parties to the deed of 1808 had given it that practical construction. But if the deed of 1808 was liable to doubt and difficulty upon this point, the sense of the parties was more explicitly declared in the deed of the *29th of *December*, 1815, which was also prior to any deed under which the appellant sets up a right. This last deed was from the representatives of *L.* and *F.* to the respondent and one *T. M.*, and it was a covenant with them to release and confirm to the owners of any steam-boat owned and run on the *Hudson* river, or on the sound between *New-York* and *Long Island*, or between *New-York* and *Elizabeth-town Point*, or *Elizabeth-town*, to the whole extent of the township, all the right and title which they then held. The respondent was, at the time, owner of a steam-boat running between *Elizabeth-town Point* and *New-York*, and there was then *no other* subsisting grant under *L.* and *F.*, relative to a navigation between *New-York* and *Elizabeth-town*, or any part of it, but the one to *J. R. L.* The covenant to release and confirm, in respect to those waters, applied to that grant, and to none other, and when the representatives of *L.* and *F.* speak of running between "*New-York* and *Elizabeth-town Point*, or *Elizabeth-town*, to the whole extent of the township," they give a construction to the former deed, and recognize a right out of them, to the reasonable and just extent which the grant imported. They must have considered the right under *J. R. L.* in that broad extent, as then subsisting and held, or they would not have used such pointed and strong description when speaking of that right. The expression was evidently intended to be *declaratory* of the meaning and operation of the former deed. The words have no sense, or meaning, or application, in any other view; and neither the representatives of *L.* and *F.*, nor those claiming under them, can now be permitted to put a narrower construction upon their former grant, and especially

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It is, however, an act of justice to those representatives, to observe, that no subsequent attempt appears on their part, to defeat or impair the right previously granted.

The appellant sets up a right to navigate steam-boats between *Elizabeth-town* and *Halsted's Point* and *New-York*, derived under the deed from the representatives of *L. and F.*, of the 14th of September, 1816, to *Daniel D. Tompkins* and *Adam and Noah Brown*. The extent of this grant is partly *described in the appellant's answer, and partly given by a reference to the deed. It was "the right of navigating, for all purposes whatsoever, steam-boats upon, over, and across the waters of the bay of *New-York*, *Staten Island Sound*, the outward harbor, including *Prince's* and *Gravesend* bays, a part of the *Atlantic* shore, and *Jamaica* bay, &c. And also the right to stop and land passengers, and discharge cargoes, at the city of *New-York*, and the sole and exclusive right of navigating with steam-boats to and from the city of *New-York*, to and from *Shrewsbury* bay and rivers in the state of *New-Jersey*, *Sandy-Hook*, *Spermaceti Cove*, and the shores and waters adjacent thereto, lying within and to the southward of *Sandy-Hook*, *Fort Diamond*, and the shores of *Long Island* from *Denise's* heights inclusive, southerly along *Gravesend* bay, &c. And the sole and exclusive right of touching at any point on the easterly and southerly side of *Staten Island*, and any point or place on the said shores, at which the parties of the first part may now stop or touch, consistently with the rights heretofore granted." This deed was not intended to interfere with the former grant to *J. R. L.* and the only part of it that looks like an interference is in the expression *Staten Island Sound*. But we find, afterwards, in the deed, that expression explained by the liberty given (though very cautiously and at the risk of the grantees,) to stop and touch at any part on the *easterly and southerly side of Staten Island*. There is no liberty to stop or touch, or deliver or receive passengers or freight, at any port or place in *Staten Island Sound*. There is no privilege granted to navigate between *New-York* and *Elizabeth-town*, or to touch, or receive, or land passengers; and every assumption of such right, as derived from and under that deed, is manifestly groundless. If any right be given to navigate on the route to that place from *New-York*, it is only a water passage through *Staten Island Sound*; and every act in carrying passengers, as between *New-York* and *Elizabeth-town*, under color of that deed, is a trespass upon the rights of the grantors or their lawful assignees.

If the grantees in that deed had no such right, they had none to impart to others, and it becomes unnecessary to examine *into the legal import and operation of the subsequent deeds from those grantees to the appellant.

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There was an objection raised in the answer to not making of *Thomas Morris* a party, because his name is mentioned in the deed of the 29th of *December*, 1819. But as it is no where averred, nor does it appear, that Mr. *Morris* was the owner of any boat to which the covenant in that deed applied, he had no interest in this cause, and there was no need to make him a party.

Every branch of the right and title set up in the answer as matter of defence, appearing to be without support or solidity, the motion to dissolve the injunction was, consequently, denied. As the injunction was, however, granted before the decision on the 3d day of *May* last, in the cause of *Livingston v. Ogden and Gibbons*, (a) it might perhaps be more extensive than the doctrine laid down in that decision could warrant. I therefore so modified or explained the operation of the injunction, as to confine it to the whole of the waters in the bay of *New-York*, on the passage or route between the city of *New-York* and *Elizabeth-town Point* or *Elizabeth-town*, or any part thereof, and not to apply it to the waters of the sound that lies between *Staten Island* and the state of *New-Jersey*, so long as the boats of the appellant did not leave the sound on their passage to the city of *New-York*.

S. Jones, jun., for the appellant, contended, that the exclusive right set up by the respondent, under the laws of the state of *New-York*, was inconsistent with the principles and provisions of the constitution of the United States; and that those laws, purporting to create or establish such exclusive right, were unconstitutional and void; and that the exclusive right, therefore, claimed under them, can have no force against the appellant. The respondent claims under the acts of the legislature of this state. The appellant claims not only under the broad, natural right of every citizen freely to navigate the public waters of the *United States*, but under the express authority of the *United States*, granted by the license to his boats to carry on the coasting trade. Here, then, is a direct collision between the authority of the *government of the *United States*, and that of this state; and this court need not be informed, that, in such a case, the state laws must yield to the paramount authority of the general government. The power of Congress to pass the act for enrolling and licensing ships or vessels, to be employed in the coasting trade, &c. (13 sess. 1793. 1 vol. *L. U. S.* 332.) is derived from the clause in the 8th section of the first article of the constitution, empowering Congress to regulate commerce with foreign states, and among the several states, &c. The power will not be denied, and it has been fully exercised. The right to regulate the coasting trade is solely and exclusively vested in Congress. No state can, therefore, restrain or prohibit the exercise of that

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(a) This case, as well as that of *Ogden v. Gibbons*, will be found in the 4th vol. of *Johns. Ch. Reports*.

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right. Do not the acts of the legislature of this state limit and restrain the right of trading coastwise? It prohibits all citizens of the *United States*, except *R. R. L.* and *F.* and their assigns, from using or navigating the waters of this state with boats or vessels propelled by steam or fire. Might not the state have, in like manner, granted an exclusive privilege to navigate the waters of the state with vessels moved by sails of a particular construction? Suppose some new improvement in steam-boats or vessels, by which their capacity and velocity should be so much increased, that no vessels with sails could enter into competition with them; would not, in that case, the whole internal trade of the *United States* be monopolized by these grantees and their assigns? Again; suppose a vessel propelled by steam, belonging to some *European* state in amity with the *United States*, should arrive at the mouth of the *Hudson*, with the intention of ascending the river, could any law of this state prevent her entrance into our harbors? Might not the master of such vessel say, "I know of no laws or regulations of a particular state in regard to trade or commerce; I claim the privilege of entering the harbor of *New-York*, under the laws of the *United States*, and the treaty of amity and commerce subsisting between them and my sovereign, and which, by your constitution, is declared to be the supreme law of the land." Again; suppose a patent by the *United States* to any individual, granting him the sole right of navigating the waters of the *United States*, by boats or vessels propelled by steam *or fire; could the patentee be prevented by Messrs. *L.* and *F.*, or their assigns, from entering the port of *New-York*? The case of *Livingston v. Van Ingen*, (9 *Johns. Rep.* 507.) which, no doubt, will be cited and relied upon by the other side, is clearly distinguishable from the present case; and the appellant may humbly presume that this court will willingly avail itself of any circumstance that will distinguish this case from the one formerly decided. The suit here is between a citizen of *New-Jersey*, and one claiming under a citizen of this state. The appellant, moreover, claims under a law of the *United States*. Here, then, are two important features distinguishing this case from that of *Livingston v. Van Ingen*, in which stress was laid upon the fact of its being a suit between citizens of this state. In delivering his opinion in that case, the late *chief justice*, (*ib.* 568, 569.) is careful to say, that the law did not interfere with the power of Congress to regulate commerce, foreign or domestic. Again, the present *chancellor*, then *chief justice*, (*ib.* 582.) intimates, that possibly, before a competent tribunal, the right derived from the state would be obliged to yield to the patent right, as being founded on the paramount law; though he reserves himself on that question, which is the one now presented to the court in this case. It is manifest, then, that this case is not governed by that of *Livingston v. Van Ingen*. Though it may be true that, until Congress does exercise a power of legislation given by the con-

stitution, a state may exercise it; yet when Congress does exercise the power, the power of the state, as to that object, must cease. It is to be presumed that the legislature, in passing these acts, supposed that they did not interfere with any right granted by the laws of the *United States*.

Again; the appellant has acquired a right to navigate with his boats under *Tompkins* and *Brown*; but it is not necessary, at present, to urge this point further.

The counsel cited various laws of the *United States* relative to tonnage, duties, &c., and the treaties of amity and commerce between *Great Britain* and the *United States*, and between *Spain* and the *United States*, and between *Russia* and the *United States*.

**Hoffman*, for the respondent, contra, admitted, that it was competent to the *United States* to grant to foreign states, leave to navigate the waters of the *United States* with steam-boats; but he said it was unnecessary to examine or discuss the power of Congress as to treaties, for it must be conceded, that a treaty must be paramount not only over the laws of the several states, but over those of the *United States*. The pleadings in this cause do not bring up any question about foreign vessels, or the effect of treaties. The defendant rests his defence upon a coasting license obtained from a collector of *New-Jersey*, which he does not pretend to use in the coasting trade; but merely as a cover, in order to evade the laws of this state in favor of *L. and F.* and their assigns. It was reserved for the ingenuity of the appellant to discover such a mode of evasion. It is too late to question the great public benefits which have been derived from the steam-boats which have been brought into operation under these laws. The validity of the acts was not questioned at the time; but now, when the advantages to be derived from the privilege granted are established, a cry of monopoly is raised against the exclusive right.

Patents under the laws of the *United States*, can be granted only for new inventions and discoveries. In *Great Britain*, patents are granted not only for new inventions, but for improvements imported from abroad. This state has reserved to itself the precious and very important power of encouraging art and science, by granting exclusive rights to use improvements introduced from foreign states. Congress may give to authors and proprietors of books, an exclusive right of publication and sale. But would a state, in which slaves exist, allow an author, though he had taken out a copy right, to vend a book exciting slaves to insurrection and murder? The patent right must be subject to such laws as a state may pass for its own security.

Again; it is said the appellant's boats had *coasting licenses* granted under the laws of the *United States*, and may, therefore, navigate freely the waters of the state. But the act for enrolling and licensing vessels in the coasting trade is intended

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merely to give a *character* to the vessels so employed, and for the purposes of *revenue*. The object is to *prevent smuggling, by regulating the coasting trade. Vessels under twenty tons are licensed. Vessels above that burthen are enrolled and licensed. The enrolment and license confers no new right or power; but only exempts the vessels so licensed from paying foreign duties. These vessels had as much a right to navigate the waters of the *United States*, before obtaining the license, as after. It merely marks the national character of the vessel, exempts her from the payment of foreign duties, and guards against frauds on the revenue. If a coasting license, obtained from a collector in *New-Jersey*, would protect a vessel from the operation of the laws of this state, so would a license granted by a collector in *New-York*, and thus all the wholesome and salutary regulations of the state would be evaded. Could not this state, in time of war, prohibit the transportation of grain from *Albany* to *New-York*? Can it not, in case of pestilence, prevent a vessel from going from *Albany* to *New-York*? Is a vessel, having a coasting license from the *United States*, to defy the laws of the state, passed for the safety of its citizens? Is such a license to ride paramount over all the municipal laws of the state? If so, there is an end to the laws relative to quarantine, turnpikes, ferries, against the introduction of slaves, &c. If the doctrine, now for the first time set up, as to the effect of a coasting license, is to prevail, the power of the state as to the regulation of its own domestic police and concerns, must be wholly prostrated. But it is unnecessary to enlarge on this subject, as every question has, in fact, been settled in the case of *Livingston v. Van Ingen*, which was very fully argued, and in which we have the reasons for the decision given by three of the judges of the Supreme Court. Under the faith of the law, as pronounced by the unanimous decision of this court, in that case, the respondent, and many other persons, have purchased rights under *L. and F.* Will this court now abandon that decision, and sacrifice all the rights which have been acquired under it?

This case, we supposed, was to be brought here, to be argued merely *pro forma*, for the purpose of having the cause carried up to the Supreme Court of the *United States*. It is hardly to be imagined that the appellant's counsel could *entertain any serious expectation of inducing this court to reverse its own solemn decision in *Livingston v. Van Ingen*.

Henry, in reply. It is matter of surprise and regret, that any appeal should be made to state pride, or to prejudices which may exist on this subject. But if it can be demonstrated that the acts of the legislature are in collision with the laws of Congress, this court need not be reminded of its duty to support the constitution of the *United States*. The fallacy of the argument, on the part of the respondent, lies in taking it for

granted, that the law of Congress for enrolling and licensing of vessels in the coasting trade, is intended merely to give a character to those vessels, and to protect the revenue; and that it does not confer any rights not before enjoyed. The whole power of regulating trade and commerce is given to Congress; and the 10th section of the same article of the constitution imposes express restraints on the several states. A state, without the consent of Congress, cannot lay a tonnage duty, yet it is contended that a state may prohibit the entry of a vessel within its waters. Among the qualifications required by the act of Congress, nothing is said about the power by which the vessel is impelled, whether fire, steam or wind. The license permits her to trade from port to port in the *United States*; that is, to every port within the *United States*. But of what avail would be his license to trade from port to port, if a particular state can prohibit the entry into its ports of vessels of a certain description? Every state may grant similar monopolies. What, then, is to become of the coasting trade, or right under the laws of the *United States*? A vessel having a coasting license may land part of her cargo in one port, and obtain a permit to land the residue in another port. Suppose a vessel propelled by steam, having a coasting license, proceeds from a port in *New-Jersey* to *Philadelphia*, and there lands part of her cargo, and receives from the custom house a permit to proceed to *New-York* with the residue, can she be seized as forfeited under the laws of this state, for a violation of the rights of *L.* and *F.* or their assigns? If Congress have power to give *the right to trade coastwise, then every act of a state legislature, prohibiting or restraining the exercise of that right, comes in direct collision with the law of Congress.

As to patents, the power of a state to prohibit the introduction of noxious drugs, or of a dangerous book, does not touch the property of the owners of the drugs or books. Congress has expressly provided for the observance of the *quarantine* laws of the states; and the constitution of the *United States* prohibits the importation of slaves. Suppose it did not, and Congress should expressly authorize the slave trade, would any particular state have power to prohibit their importation? However unpalatable this doctrine may be to state pride, it must be the law, else there is an end to the government and authority of the *United States*. The cases which have been put, are those about which Congress have passed no law. A state passes a law that no carriage shall run on any public road within the state, unless its wheels are of a certain breadth. But suppose Congress should pass an act licensing carriages to pass through the *United States*, for the purposes of trade, with wheels of a different description, could those carriages be stopped and seized by the state officers? The distinction is between *regulation and interdiction*. A noxious thing may be

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restrained or regulated. That is matter of general police. But to say that a steam-boat of another state shall not navigate the waters of this state, is interdiction. It seems to be conceded, that if a steam vessel, owned by the subjects of a foreign state, with whom the *United States* have formed a treaty of commerce, should arrive in our waters, she could not be seized; because the state law must yield to the treaty as the paramount law of the land. But is not every law of Congress made in pursuance of the constitution, also, the paramount law of the land? By the treaty of *Ghent*, the port charges of the two governments were to be equalized; and higher duties having been imposed in the port of *New-York*, the act, on the complaint of *G. B.*, was repealed. We do not ask that the grant to *L.* and *F.* should be repealed, and thus far, this court may adhere to its former decision. We do not call to our aid *Nep-tune* with his trident; we invoke only the goddess *Minerva*.

PLATT, J. This is an appeal from an order of the Court of Chancery, denying a motion for dissolving an injunction, whereby the steam-boat of the appellant was restrained from running between *Elizabeth-town Point* in *New-Jersey* and the city of *New-York*.

The great question which arose in the case of *Livingston and Fulton v. Van Ingen and others*, (9 *Johns. Rep.* 507.) whether this state had the power to grant an exclusive right of navigating its waters with steam-boats, is again raised in this cause. That question was then elaborately and profoundly discussed on appeal in this court; and after mature consideration, this court, by a unanimous decree, decided, that the statutes of this state for granting and securing to *Livingston* and *Fulton*, and their assigns, that exclusive privilege, were constitutional and valid.

Immediately after that decision, many persons who had resisted the claim to such exclusive privilege, yielding obedience to that decree, as settling the question by the highest judicial tribunal of the state, became purchasers of that privilege under *Livingston* and *Fulton*. The respondent, *Aaron Ogden*, stands before this court as an assignee under them, and claims the benefit of his purchase. His right is denied by the appellant; 1st. On the old ground, that the state had no power to grant such exclusive privilege in any case; and, 2dly, That he (the appellant) derives authority to navigate his steam-boats under the act of Congress of the 18th of *February*, 1793, for enrolling and licensing coasting vessels, &c.

As to the first general question, I consider it as no longer open for discussion here. It would be trifling with the rights of individuals, and highly derogatory to the character of the court, if it were now to depart from its former deliberate decision on the very same point.

As to the second ground relied on by the appellant, to wit,

the *coasting license*, I am unable to discern how that can vary the merits of the question, as presented in the case of *Liv- ington v. Van Ingen*. IN ERROR.

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*The act of Congress for enrolling and licensing coasting ships, or vessels, &c. enacts, that "no ships or vessels, except such as shall be so enrolled and licensed, shall be deemed ships or vessels of the *United States*, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries." (sect. 1.) And the same act also declares, that every ship or vessel engaged in the coasting trade, &c., and not being so enrolled and licensed, "shall pay the same fees and tonnage in every port of the *United States* at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the *United States*; and if she have on board any articles of foreign growth or manufacture, or distilled spirits other than sea-stores, the ship or vessel, with her tackle and lading, shall be forfeited." (sect. 6.)

From these provisions, and an examination of the various regulations of that statute, and from all the laws of the *United States* on that subject, it appears, that the only design of the federal government, in regard to the enrolling and licensing of vessels, was to establish a criterion of *national character*, with a view to enforce the laws which impose *discriminating duties* on *American* vessels, and those of foreign countries.

The term "*license*" seems not to be used in the sense imputed to it by the counsel for the appellant: that is, a *permit to trade*; or as giving a *right of transit*. Because it is perfectly clear, that such a vessel, coasting from one state to another, would have exactly the same right to trade, and the same right of transit, whether she had the coasting license or not. She does not, therefore, derive her right from the *license*; the only effect of which is, to determine her national character, and the rate of duties which she is to pay.

Whatever may be the abstract right of Congress, to pass laws for regulating trade, which might come in collision, and conflict with the exclusive privilege granted by this state, it is sufficient, now, for the protection of the respondent, that the statute of the *United States* relied on by the appellant, is not of that character.

Whether Congress have the power to authorize the coasting trade to be carried on, in vessels propelled by steam, *so as to give a *paramount right*, in opposition to the special license given by this state, is a question not yet presented to us. No such act of Congress yet exists, and it will be time enough to discuss that question when it arises.

I am decidedly of opinion, therefore, that the *coasting license* affords no aid or support to the title of the appellant, to run a steam-boat on our waters, in opposition to the laws of this state.

The real merits of this case fall precisely within the decision

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ALBANY, As a senator, I was a party to that decision; and concurred
January, 1820. in it, for the reasons which were then assigned by the learned
FANNING judges who delivered the opinion of the court. Those reasons
v. are before the public: and I have not the vanity to believe,
CONSEQUA. that I could add any thing to their force or perspicuity. I,
therefore, deem it my only remaining duty to say, that in my
judgment, the decree of his honor the chancellor, in this case,
ought to be *affirmed*.

April 27th.

This being the unanimous opinion of the court, it was there-
upon ORDERED, ADJUDGED and DECREED, that the decretal order
of the Court of Chancery made in this cause, on the 6th of *Octo-*
ber, 1819, and from which order the appellant in this cause has
appealed to this court, be, and the same is hereby, in all things,
affirmed, with costs to be taxed and paid by the appellant to
the respondent; and that the record be remitted, &c.

Decree of affirmance. (a)

(a) Vide *Gibbons v. Ogden*, 9 *Wheaton's Rep.* 1. The acts of the legislature
of the state of New-York, granting to *Robert R. Livingston* and *Robert Fulton*
the exclusive navigation of all the waters within the jurisdiction of that state,
with boats moved by fire or steam, for a term of years, are repugnant to that
clause of the constitution of the United States, which authorizes Congress to
regulate commerce, so far as the said acts prohibit vessels licensed, according to
the laws of the United States, for carrying on the coasting trade, from navi-
gating the said waters, by means of fire and steam.

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COLES, *appellants*,
against
CONSEQUA, *respondent*.

Interest is pay-
able according
to the laws
of the country
where the con-
tract is made;
but if, by the
terms or nature
of the contract,
it appears that
it is to be ex-
ecuted in another
country, or that
the parties had
reference to the
laws of another
country, then the
place in which
it was made is,
in this respect,
immaterial, and
it is to be gov-
erned by the
laws of the
country in
which it is to
be performed.

APPEAL from the Court of Chancery. The respondent, a
native merchant of *Canton*, in *China*, in *January*, 1813, filed
his bill in the Court of Chancery, stating, particularly, various
shipments and consignments of goods by the respondent, to the
appellants, (ship owners and commission merchants,) residing
in *New-York*, for sale, &c., and other transactions between them,

Where a *Chinese* merchant, residing at *Canton*, consigned goods to a merchant in *New-York*, and
which were delivered to his agent in *Canton*, to be sold by him, and the nett proceeds to be remitted
to the consignor at *Canton*; Held, that the consignor was entitled to recover interest only according to
the law of *New-York*, and not according to the law or custom of *Canton*.

Though in questions arising between subjects or citizens of different states, each is to be considered a
party to the laws of his own government; yet, whether this principle applies to a question between prin-
cipal and agent, as of a foreign merchant consigning goods to his factor here for sale, and the latter is
prevented by an embargo from remitting the proceeds to his principal. *Quære?*

between the years 1805 and 1813 ; that the appellants, by *Obed Chase*, their authorized agent, on the 19th of *January*, 1811, gave the plaintiff a promissory note dated at *Canton*, for 35,777 dollars and 50 cents, twelve months after date, with interest at 12 per cent., which is the lawful and customary rate of interest at *Canton*, and which note was given for goods sold and delivered to the appellants, and remained unpaid. That in *December*, 1809, *J. S. Crary* and *William Nexsen*, as lawful attorneys or agents of the appellants, gave to the respondent, at *Canton*, a promissory note for 39,690 dollars and 63 cents, payable 15 months after date, with interest, after the same should become due, at 12 per cent. ; which note was unpaid, and seven months interest due thereon, when the said *Crary*, as agent of the appellants, gave to the respondent a promissory note for 2,910 dollars and 64 cents, for the amount of interest so due, payable in twelve months, with interest, at 12 per cent., which note was unpaid. That on the 25th of *November*, 1810, the respondent shipped on *board the *Chinese*, teas and cassia, to the value of 64,828 dollars and 65 cents, consigned to the appellants to be sold, and the proceeds remitted to him, &c. &c. The respondent charged that the appellants received all the goods so shipped, and sold them, and received the proceeds, and have retained them or wasted them, at least part of them, by their negligence, and have refused to render any account, and remit the proceeds, &c. That on the 12th of *November*, 1807, the respondent delivered to the appellant, *E. F.*, at *Canton*, a promissory note of *Acors Sheffield*, dated *February* 6th, 1816, for 4,080 dollars and 81 cents, payable in 15 months, with interest, afterwards, at 12 per cent., for collection, and to account to the respondent for the same ; that *E. F.* received the note in behalf of the appellants, who have either collected the money, or lost it by their gross negligence, and have refused to account for it, &c. The respondent prayed, that the appellants be decreed to come to a full account with the respondent, concerning the premises, and to pay him what should be found due, &c.

The appellants put in their *answer*, stating various matters in defence, and various counter claims by way of deduction and set-off, &c.

The cause having been brought to a hearing, on the pleadings and proofs, the court, on the 30th of *September*, 1817, made the following decretal order: That it be referred to a master to take an account between the plaintiff and defendants, touching the matters in the pleadings mentioned ; and that, in taking such account, the master charge the defendants with the goods in the pleadings mentioned, shipped by the plaintiff on the 22d of *December*, 1807, in the ship *John and James*, amounting, according to the invoice, to 19,837 dollars 77 cents, consigned by the plaintiff to the defendants, and by them received to sell and dispose of for the plaintiff ; and, also, charge the defendants with the goods, in the pleadings mentioned, shipped by

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the plaintiff, on the 24th of *December*, 1807, in the ship *Hope*, and in the ship *Atahualpa*, amounting, according to the invoice price, to 29,135 dollars and 63 cents, as for goods *consigned* by the plaintiff to the defendants to sell for the plaintiff; *and, also*, charge the defendants with 35,711 dollars and *50 cents, upon the foot of a promissory *note*, in the pleadings mentioned, dated the 19th of *January*, 1811, given to the plaintiff by *Obed Chase*, as the authorized agent of the defendants, payable sixteen months after date; *or*, if the master should be of opinion that *Obed Chase* was not duly authorized to give it, that then the master charge the defendants with that sum, as for goods sold and delivered by the plaintiff to the defendants, on the 19th of *January*, 1811, at a credit of sixteen months; *and, also*, charge the defendants with 36,690 dollars 63 cents, upon the foot of a promissory *note*, in the pleadings mentioned, given the 9th of *December*, 1809, to the plaintiff, by *John Smith Crarr* and *William E. Nerssen*, as the authorized agents of the defendants, payable fifteen months after date; *and, also*, charge the defendants with only so much of the goods in the pleadings mentioned, and shipped by the plaintiff, on the 25th of *November*, 1810, in the ship *Chinese*, amounting to 64,828 dollars and 65 cents, according to the invoice price, after deducting 43,025 dollars and 87 cents, being so much of the shipment as the plaintiff appears to have assigned to *William Baring* and others, in the pleadings mentioned, and that the sum of 21,798 dollars 78 cents, being the residue of the last shipment, after deducting the assignment to *Baring & Co.*, be charged as for goods *consigned* by the plaintiff to the defendants, and by them received to sell for the plaintiff; *and, also*, charge the defendants with the goods, in the pleadings mentioned, shipped by the plaintiff, on the 29th of *November*, 1810, in the ship *Hope*, amounting, according to the invoice price, to 6,370 dollars and 21 cents, as for goods *consigned* by the plaintiff to the defendants, and by them received, to sell for the plaintiff; *and, also*, charge the defendants with *interest*, at the rate of *twelve* per cent., upon all the items before mentioned, from such times as the said sums ought to have been paid, that is to say, in case of goods sold, from the expiration of the term of credit; and in case of goods consigned, from the times the proceeds ought to have been remitted, having regard to the course of such dealings; and in case of promissory *notes*, from the time of payment therein specified. *And, also*, charge the *defendants with 900 dollars, being so much of the amount of the promissory note, in the pleadings mentioned, given by *Acors Sheffield* to the plaintiff, and by him placed in the hands of the defendants to collect, as was received by the defendants; *and, also*, such further sum, as it shall satisfactorily appear to the master, the defendants might have received, if they had used due diligence in collecting it, with lawful interest, from the time the same was received, or might have been received, as aforesaid. *And that the plaintiff*

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be allowed, in such account, all such further sums as shall appear that the defendants ought to account for and pay, by reason of any dealings and matters in the bill mentioned, with such *interest* as the nature of the case, and the course of the dealings between the parties, shall render just. *And that* the master make all proper allowances to the defendants for all *remittances and payments* made by them to the plaintiff, or to others for his use, and by his authority; *and that* the master be at liberty to examine the parties, under oath, on interrogatories, and such other witnesses, not already examined, as either party may produce.

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The master, on the 31st of *January*, 1818, made a *report*, in which he stated, that he had *charged* the appellants with the nett proceeds of the different consignments particularly mentioned in the decree, and with the goods sold, and with the amount of the notes; and that he had charged 12 per cent. *interest* on the items, except the last, in which the remittance was made in due time; and that he had *credited* the appellants for all remittances and payments by them made, on account of the said consignments and sales, and with all just allowances, and had calculated *interest* at 12 per cent. on the *credits*; leaving a balance due to the respondent, for principal and interest, at the date of the report, of 104,457 dollars and 91 cents. On the filing of the report, the appellants presented to the chancellor a petition for a *rehearing*, stating their objections particularly to the report.

1. Because it does not direct a *general account* to be taken between the parties:

2. Because the decretal order limits and circumscribes the charges to be made by the defendants against the plaintiff, **to remittances and payments* by them to the plaintiff, and to others, for his use, and by his authority; and the master has decided, that the defendants cannot be allowed for any charge or matter of account, unless it be shown to be a remittance or payment, specially and specifically applied to one or other of the matters with which the defendants are charged and made accountable by the decree; by reason whereof, matters of account to a very large amount, and, as the defendants believe, to a sum not less than 86,000 dollars, are wholly excluded from the said account; and the defendants are barred from the benefit thereof:

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3. Because the defendants are charged with a promissory note, given by *Obed Chase* to the plaintiff, for 35,711 dollars and 50 cents, or with *goods sold and delivered* to the defendant, to that amount, which, by the terms of the decree, as it relates to the defendants, is substantially the same thing; whereas, by the pleadings and proofs, the defendants are not justly liable to be charged with the same in either shape; but only as for goods *consigned* to the defendants, by the plaintiff, to be sold for his account, and in this way they are willing to account.

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4. Because the defendants are charged with *interest at twelve* per cent. per annum, upon the items in the decree mentioned, or notes, or goods sold by the plaintiff to the defendants, and *consigned* to the defendants to be sold, from the expiration of the credits, in the case of notes and goods sold; and in the case of goods *consigned*, from the time when the proceeds ought to have been remitted; whereas, the defendants ought not to be charged with any greater interest in the case of *consignments*, where the contract was made here, than is allowed by the law of this state.

5. Because the defendants are charged with so much of the goods in the pleadings mentioned, and shipped by the plaintiff to the defendants on the 25th of *November*, 1810, on board the ship *Chinese*, as would amount to 21,798 dollars and 78 cents, invoice price, being part of the invoice of 64,818 dollars and 65 cents, whereof 43,025 dollars and 87 cents appeared to have been assigned to *Baring & Co.*; which is erroneous, because no part of the said cargo was specifically assigned to *Baring & Co.*; but another and different *shipment made by the plaintiff to the defendants, in a former voyage of the ship *Chinese*; and the shipment to *Baring & Co.* was, in 1809, the amount of the invoice of which was the sums last mentioned. and which shipment is not stated in the plaintiff's bill; but the facts are set forth at large in the answer.

6. Because the defendants are directed to account for the proceeds of the said invoice of 64,828 dollars and 25 cents, deducting only 43,025 dollars and 87 cents, part thereof; whereas, the defendants are bound to account to *Baring & Co.*, or their representatives, for the full sum of 43,025 dollars and 87 cents, whether the invoice would amount to that sum or not; and the defendants are sued in the Circuit Court of the *United States*; and there is reason to apprehend that they will be compelled to account for the full sum, provided there should be a balance in their hands to that amount due to the plaintiff, including the invoice assigned.

The cause was, accordingly, *reheard*, upon all the parts of it complained of in the petition of rehearing; and on the 3d of *December*, 1818, the chancellor made a decretal order, *affirming* the order of the 30th of *September*, 1817, and that the report of the master made pursuant thereto, be confirmed, unless cause to the contrary be shown by the appellants in eight days. From these decrees, the appellants, on the 11th of *December*, 1818, filed their appeal to this court.

As the decree of the Court of Chancery was reversed in part only, it is deemed unnecessary to make a more full statement of the facts here, as they may be seen in the report of the case in that court.

. THE CHANCELLOR assigned his reasons for the decrees, which

were the same as stated in the report of the case. (3 Johns. Ch. Rep. 587—612.)

The cause was argued by *T. A. Emmet* for the appellants, and *S. Jones, jun.* for the respondent.

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*For the appellants, the following points were stated :

1. That a *general account* should be taken between the respondent and the appellants of all transactions between the 1st of *September*, 1805, until the time of filing the respondent's bill in the Court of Chancery.

2. That the appellants should not be charged with the promissory note for \$35,711 and 50 cents, given by *Obed Chase*, to the respondent, nor should the same be received as evidence of the value of the goods and merchandize for which it was executed ; but that if the appellants are to be charged for them as goods sold and delivered, they should be at liberty to establish the value thereof by other competent testimony. But that the said goods ought to be charged to the appellants as a consignment, and not as a sale to them.

3. That the note given in *December*, 1809, by *Crary* and *Nexsen*, for \$39,690 and 63 cents, should not be received as evidence of a debt or settlement between the parties ; but that the respondent be at liberty to establish the debt for which it is alleged to have been given, or any part thereof, by competent evidence : But, on such debt, no interest should be allowed, exceeding *ten per cent.* per annum.

4. That the note given by *Crary*, on the 15th of *October*, 1811, as for *interest* on the note last mentioned, should not be considered as a settlement, or binding on the appellants ; but that the interest on the debt purporting to have been secured by the note last mentioned, be calculated to the time of taking the note, at simple interest.

5. That no interest exceeding the legal rate of interest of this state should be allowed on any goods or merchandize sold on credit, by the respondent to the appellants, nor on the proceeds of goods consigned by him to them, for the purpose of being sold.

6. That the sum of \$43,025 and 87 cents, and the interest thereon from the date of the assignment of that sum to Messrs. *Baring and Co.*, should be deducted in favor of the appellants, from the general balance in favor of the respondent, (if any,) and not from the proceeds of any particular shipment ; and that in every event, the appellants *should be allowed the whole of that sum, and the interest thereon.

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PLATT, J. The chancellor has justly considered the written contract of the 1st of *November*, 1807, signed by *Consequa* and *Edmund Fanning*, as virtually waived and abandoned, by mutual consent of the parties.

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I also fully concur with him in opinion, that the cargo of goods shipped in the "*Chinese*," and for which *Obed Chase* gave a note, as agent for the appellants, must be deemed as goods sold and delivered by *Consequa* to them at *Canton*. Even admitting that *Chase* had no previous authority to make such a purchase, or to give such a note, on account of the appellants, yet as they actually received and converted the goods, with full notice that the cargo was sent by *Consequa*, as goods sold, their subsequent ratification and adoption were equivalent to a previous authorization. The appellants were, therefore, justly charged with the amount of that shipment, according to the invoice price; and with interest according to the rate allowed in *China*; the contract of purchase having been made there, and the price being payable there.

The other cargoes have been properly considered by the chancellor, as consigned to the appellants, as general commission merchants, under a contract on their part, to sell the goods for account of the consignor, and to remit the nett proceeds.

But in allowing interest according to the law of *China*, on such nett proceeds, it seems to me, his honor the chancellor, has erred in his application of the rule of the *lex loci contractus*.

According to *Huberus*, (*de conflictu legum*, vol. 2. book 1. tit. 3.) the general rule is, that contracts are to be interpreted according to the laws of the country where they are made. But if by the terms or nature of the contract, it appears that it was to be executed in a foreign country, or that the parties had respect to the laws of another country, then the place of making the contract becomes immaterial; and the obligation must be tested by the laws of the country where the duty was to be performed. Or, in the words of **Huberus*, "*verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Nam contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.*"

In *Champant v. Lord Ranelagh*, (*Pr. Ch.* 128.) it was decided, that a bond executed in *England*, and made payable in *Ireland*, carries *Irish* interest; where no interest was mentioned.

In *Robinson v. Bland*, (2 *Burr.* 1077.) a bill of exchange drawn in *France* for money lent there, and made payable in *England*, was deemed a contract subject to the laws of *England*; and to bear *English* interest.

In *Thompson v. Ketchum*, (4 *Johns. Rep.* 285.) a note was drawn in *Jamaica*, and made payable in *New-York*; and the Supreme Court of this state followed the same rule. In *Smith v. Smith*, (2 *Johns. Rep.* 235.) *Ruggles v. Keeler*, (3 *Johns. Rep.* 263.) *Emory v. Grenough*, (3 *Dal. Rep.* 369.) and *Van Schaick v. Edwards*, (2 *Johns. Cas.* 355.) the same doctrine was maintained.

In the case of *Ekins v. East India Company*, (1 P. Wms. 395.) cited by the chancellor, it was decided, that for a tortious sale of the plaintiff's ship in *India* (by his agent there) to the defendants, they should account for the value in *India*, with 12 per cent. interest, according to the laws of that country, deducting only the charge of remittance to *England*, where the remedy was sought. But that case bears a marked distinction from the one now before us; because, in that case, the whole transaction took place, and the entire cause of action arose in *India*.

There is no doubt of the rule laid down by the chancellor, "that interest must be paid according to the law of the country where the debt was contracted, and to be paid." He says, in this case, "the plaintiff consigns a shipment to the defendants, and the cargo is received at *Canton*, by the agent of the defendants on their behalf; *Canton* is then the place where the contract is made, and *Canton* is the place where the debt is to be paid."

With great respect, it seems to me, that his honor the chancellor did not advert to the important consideration, *that by the terms of the contract so made at *Canton*, the goods were to be brought to *New-York*, not for the account and at the risk of the consignees, but to be sold *here*, by them, as factors or commission merchants, who were to remit the nett proceeds to the consignor at *Canton*.

Here the words of *Huberus* apply: "*contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.*"

I apprehend it is not the case of "a debt contracted and to be paid at *Canton*." The contract was made *there*, but it was to be executed *here*. It was of that species of bailment called in the *civil law*, *do ut facies*. The parties had express reference to this country, as the theatre of operation under the contract. If the consignees had sold the goods in *China*, or had carried them immediately to *Russia*, and sold them there, it would have been a violation of the contract, and a tortious conversion.

The delivery of the goods to the agent of the consignees at *Canton* cannot, in my judgment, affect the present question; because they were delivered for the special purpose of being brought to this country, to be sold for the benefit and account of *Consequa*. While on the voyage to *New-York*, the cargoes were at his risk, as owner. If the goods had been burnt in a warehouse at *New-York*, or sunk in the harbor there, without blame imputable to the consignees, the loss must have fallen on the consignor. So, if the nett proceeds had been regularly shipped at *New-York*, in the usual course, for remittance to *Canton*, the obligation and duty of the consignees would have been discharged, and the money, on its voyage to *Canton*, would have been at the sole risk of *Consequa*.

By "*remitting*," I understand no more than a delivery of the

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money on board a proper vessel at *New-York*, to a suitable agent, for the purpose of being transported to *Canton*, by the usual route, and duly consigned to *Consequa*. Such agent, so employed, is to be deemed the agent of *Consequa*, for receiving and transporting money; and such delivery by the consignees, is equivalent to *payment* to the consignor. The duty of making such remittance was to be performed *here*, and the failure in the performance of that duty is the only *gravamen* of the plaintiff's claim.

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* *Consequa* had a right (and he exercised it in part) of drawing for, and receiving the nett proceeds at *New-York*, at any time before they were remitted; or, he had a right to direct the mode or channel of remittance, provided it was not unlawful.

Hence, I infer, that the contract did not oblige the consignees to *pay* the avails of the cargoes to *Consequa* at *Canton*. On the contrary, this country was the only sphere of their duties; the *res gesta* was *here*, and they were not bound to do any thing but with a reference to our own laws.

The contract is silent as to the rate of commissions, and also, as to the risk of the property, while in charge of the consignees. Suppose that, by the laws of *China*, a commission merchant would be entitled to ten per cent. for his services, and would be responsible to his principal against *all risks* would it be contended, in the case of goods sold here on commission, although sent from *China* for that purpose, that our laws, which establish different rules as to the rate of commissions, and the responsibilities of such agents, must give place to the laws of *China*? If not, why is not our law of interest equally *incident* to this contract? Why not allow *Chinese commissions* in this case, as well as *Chinese interest*?

The rule as stated in *Huberus*, and as it is exemplified in the cases before cited, seems to me, in its just application, to establish the point, that the laws of *New-York* must govern these consignments.

The case of *Ellis v. Lloyd*, (1 *Eq. Cas. Abr.* 289.) is also a strong authority in favor of the appellants, on the question of interest. There, a merchant in *England* employed his agent in the island of *Nevis*, to receive a quantity of sugar due to him there on bond, with directions to the agent to *remit the sugar to England*. The agent received the sugar, and converted it to his own use; and he was held to account for the value of it, with *interest* according to the law of *Nevis*, and not according to the law of *England*.

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In this case, *Consequa* sent to the appellants *Acors Sheffield's* note, to be collected by them; and directed the avails to be remitted to him, and he also sent goods to them *to be converted into money, and directed the nett proceeds to be remitted to him in *Canton*. Now, I can see no reason why the laws of this country should not govern in the one case as

well as the other; and certainly *Chinese interest* is not recoverable on the avails of the note. IN ERROR

Whether the *American embargo* furnishes any excuse for not remitting the nett proceeds of the consigned cargoes, or the amount collected on *Sheffield's* note, so as to bar the claim for interest, during the time in which it was unlawful to make such remittances, is a question, which, I think, does not arise in the case. The appellants have laid no foundation for such exemption; because, for aught that appears, they had the use of the money during the embargo; and, therefore, ought to pay interest for it. If they had kept that money distinctly as a deposit for *Consequa*, during the embargo, and had afterwards duly remitted it, then the question would have arisen, upon which I forbear to express any decided opinion.

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In regard to the debt due for *goods sold* to the appellants, I have no doubt the law is as stated by the chancellor, to wit: "that in questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government; and he is as much incapacitated from making the consequences of an act of his own state, the foundation of a claim to indemnity upon a foreign subject, as he would be, if such act had been done immediately and individually by himself." (*Conway v. Gray*, 10 *East*, 536.) But I am not prepared to say, that an omission to perform the office of an agent or commission merchant, where the law forbids his acting in that capacity, would subject the factor to the same hard rule. The *absolute debtor* contracts in his own right, for his own exclusive benefit, and at his own risk; but the consignee is the mere agent or servant of the consignor, acting here, chiefly for the benefit, and at the risk of his principal, and as his representative. It, therefore, seems to me *very questionable*, whether the acts of his government ought to be personally imputed to the agent, in a question between him and his principal.

*Upon the whole case, therefore, my opinion is, that the decree ought to be *reversed*, to the end, that in restating the account between these parties, the appellants be charged with interest at the rate of 7 per cent. instead of 12 per cent. per annum, on the nett proceeds of the goods consigned to them, to be sold for the account of the respondent. (a)

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This being the unanimous opinion of the court, it was thereupon "ORDERED, ADJUDGED and DECREED, that the decretal order made in the Court of Chancery, in this cause, wherein the said respondent is complainant, and the appellants defendants, and bearing date the 30th of *September*, 1817, be *reversed*, so far as the same orders and directs that the master, in taking the account thereby directed, should charge the appellants with interest, at the rate of *twelve per cent.* per annum, upon all goods and merchandize consigned by the respondent

(a) Vide *Boyce and Henry v. Edwards*, 4 *Peters's Rep.* 111. 123.

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to the appellants, to be sold for the respondent's account, from the times the respective proceeds thereof ought to have been remitted to the respondent, having regard to the course of such dealings, and the situation of the parties; *and so far as the same decree directs the sum of forty-three thousand and twenty-five dollars and eighty-seven cents, to be deducted from the amount of the shipment made by the respondent, on the 25th of November, 1810, in the ship or vessel called the Chinese, in the pleadings mentioned, as being so much of the said shipment assigned by the respondent to William Baring and others, by the description of Baring & Co., and the sum of twenty-one thousand seven hundred and ninety-eight dollars and seventy-eight cents, being the residue of the said last mentioned shipment, after such deduction as aforesaid, to be charged for goods and merchandize to that amount, consigned by the respondent to the appellants, and by them received to sell and dispose of, for account of the appellant; but that the said decretal order be, in all other things, affirmed; and it is further ORDERED, ADJUDGED and DECREED, that the decretal order made in the said Court of Chancery in this cause, on the 3d of December, 1818, be reversed, so far as the same confirms the report of the master *made in this cause, as relates to the parts of the aforesaid order and report hereby reversed or varied; but that the same be, in all other respects, affirmed; and it is further ORDERED, ADJUDGED and DECREED, that the report of the said master be varied so far as relates to the interest on the said consignments, and so far as relates to the charge in respect to the shipment made on or about the 25th of November, 1810, in the said ship or vessel called the Chinese; and that the master, in taking the said account, be directed to charge the appellants in the said account with the goods and merchandize in the pleadings mentioned, shipped by the respondent, on or about the 25th of November, 1810, in the ship or vessel called the Chinese, amounting to forty-four thousand, eight hundred and seventy-eight dollars and sixty-five cents, according to the invoice price thereof, as stated in the pleadings, as for goods and merchandize consigned by the respondent to the appellants, and by them received to sell and dispose of on account of the respondent; and that the master be also directed to charge the appellants with interest at the rate of seven per cent. per annum, and no more, in cases of goods and merchandize consigned by the respondent to the appellants, to be sold for the respondent's account, from the time the respective proceeds thereof ought to have been remitted to the respondent, having regard to the course of such dealing, and the situation of the parties; and, also, to charge the respondent with interest at the rate of seven per cent. per annum, on remittances, on account of the consignments; and it is further ORDERED, ADJUDGED and DECREED, that the record and proceedings in this cause be remitted," &c.*

*ISAAC MARQUAND, and ERASTUS BARTON, *impleaded*
with GEORGE FITCH, *appellants,*
against
 The PRESIDENT and DIRECTORS of the NEW-YORK
 MANUFACTURING COMPANY, *respondents.*

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APPEAL from the Court of Chancery. The bill filed the 25th of *May*, 1815, by the respondents against the appellants, stated, among other things, that in the year 1813, the appellants agreed to enter into copartnership for the purpose of carrying on the business of watch-makers and jewellers, under the firm of *Erastus Barton & Co.*, and written articles of copartnership were executed by them on the 24th of *January*, 1814, which were set forth in the bill. The appellant, *Fitch*, having become indebted to the respondents to a large amount, for money borrowed on endorsed notes, to secure the payment thereof, on the 23d of *April*, 1814, assigned to the respondents, among other things, his share of the copartnership stock, &c. belonging to the firm of *E. Barton and Co.* The cashier of the respondents, on the 23d of *April*, 1814, gave a written notice to *Barton and Marquand*, the other partners, stating that *Fitch* had, that day, assigned to the respondents, as collateral security, for money loaned by them to him, all his equal and undivided fourth part of all the goods, merchandize, stock in trade, debts and effects, in any wise belonging, due, owing or payable to the house or firm of *E. Barton and Co.*, in which he, *Fitch*, together with *B.* and *M.* are interested as copartners, &c., and, also, all debts, &c. *M.* and *B.*, on the 27th of *April*, 1814, acknowledged the receipt of the notice of the assignment by *Fitch* of his interest in the establishment, adding, that they should hold themselves accountable to the respondents for the same. *F.*, soon after the assignment, failed, and in *May*, 1814, became utterly insolvent.

*On the 15th of *October*, 1814, an inventory of the stock and effects was taken, at the instance of the respondents, with a view to a settlement between them and the appellants, which, however, did not take place. The respondents insisted that, by force of the assignment, and of *F.*'s insolvency, the partnership was, in effect, dissolved, and prayed for a discovery and an account, &c.

The appellants *M.* and *B.* put in their answer, setting forth the articles of copartnership, &c. They admitted the assignment of *F.* to the respondents, their notice, and the answer. They denied any consent to a dissolution of the partnership, and that if any was to be inferred from their letter in answer

A *bona fide* assignment by one of several partners, of all his interest in the co-partnership stock, &c. *ipso facto*, dissolves the partnership; although one of the articles expressly provides that the partnership is to continue until two of the contracting parties shall demand a dissolution, and the other partners wish the partnership business to go on, notwithstanding the assignment.

The assignee of the partner, in such case, is entitled to an account of the profits of the concern, and to the share of the assignor; and where an inventory had been taken of the copartnership stock, by mutu-

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al consent, six months after the assignment, and the other partners refused to deliver the share claimed by the assignee, that was taken as a true valuation, though, if the stock had been sold at public auction or private sale, the value would have been much less, and the account be-

value of such stock had fallen between the time of taking the inventory, and the taking the account before the master.

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to the notice of assignment, it proceeded from inadvertence and misapprehension, from the effect of which they prayed to be relieved. They referred to the inventory of the stock taken the 15th of *October*, 1814, but alleged that the value had considerably diminished, in consequence of the peace; that the concern was subject to heavy demands for rents, taxes, &c.; that the value of fixtures and improvements in the store would be lost, and other sacrifices incurred, by a dissolution of the concern, the business of which was then prosperously conducted, and yielded a profit, &c.; that, by the sixth article of the copartnership, it was to continue until two of the contracting parties should demand a dissolution of it: that no such concurrence of two of the parties had been declared; and that the partnership, consequently, continued; that the books were open to the inspection of the respondents, and no account was necessary; that they were not charged with any perversion or mismanagement of the funds of the concern; and that the assignment by *F.* was made under an assurance that the business of the firm should not be interrupted; and that if it was broken up, it would be injurious to the whole concern, and ruinous to *B.*, who had embarked his whole fortune in it, and for nearly three years had devoted his whole attention to it.

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The bill was taken *pro confesso* against *F.* The cause being put at issue as to *M.* and *B.*, witnesses were examined on both sides. The cause came on to be heard, on the pleadings and proofs, in *June*, 1817, and in *September* following an interlocutory order or decree was pronounced, by which *it was decreed that the partnership between *M.*, *B.* and *F.* was adjudged and declared to have been dissolved from and after the date of the assignment from *F.* to the respondents; and it was ordered that it be referred to a master to take an account of all the partnership property and effects, including debts and credits, and of the balance, if any, due to the respondents, as assignees of *F.*, upon the settlement of the concerns of the partnership; and that in taking the account, the master should make due allowances to the appellants for all just and necessary charges in relation to the partnership; and have power to examine all or any of the parties under oath, touching the matters referred to him.

The master, after a full examination and hearing before him, made his report, with the testimony before him, from which it appeared that the amount due to the respondents, as assignees of *F.*, including interest from the 15th of *October*, 1814, was \$7,617 and 69 cents. The master, in ascertaining the value of the stock, adopted the prices contained in the inventory of the 15th of *October*, 1814.

To this report the appellants filed the following exceptions:

1. That the master had adopted the original cost of the stock as the rule of value, instead of the valuation contained in two statements made before him by the witnesses, one of

which was founded on a gross deduction of thirty per cent and the other on a like deduction of fifty per cent. 2. That no deduction or allowance had been made, on account of depreciation in value by reason of its being culled, change of fashion, loss by expenses of fixtures, &c., or otherwise. 3. That the master has reported the value of the stock to be \$6,532 and 27 cents, whereas, on the principles stated in the foregoing exceptions, it would be, in the one case, \$3,477 and 20 cents, and in the other, \$2,085 and 28 cents. 4. That the master has stated the amount of capital brought in by *Fitch* to be \$6,475, whereas, the actual capital advanced by him was \$6,133 and 12 cents. 5. That he had allowed interest on the balance reported to be due.

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*The exceptions were argued before the chancellor, who, in *September*, 1818, made a final decree, overruling all the exceptions, with costs, and confirming the report, and ordering that *B.* and *M.* should pay to the respondents the sum of \$7,617 and 69 cents, reported to be due, with interest and costs.

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From this decree, as well as from the interlocutory order, or decree first mentioned, the appellants appealed to this court.

THE CHANCELLOR assigned the reasons for his decree, as follows :

The suit was for a settlement of partnership accounts, on the ground of its dissolution by the act of *Fitch*, one of the partners.

He became indebted to the *New-York Manufacturing Company*, in a very large amount, which he was unable to pay, and accordingly, on the 14th of *April*, 1814, he assigned over to them all his share, or undivided estate and interest in the copartnership between him and the appellants. In *May* following, *Fitch* actually stopped payment, and became insolvent.

It was contended, on the part of the *Manufacturing Company*, that the copartnership was dissolved, by the assignment, in *April*, or, at least, by the insolvency, in *May*. This was denied on the part of the appellants, on the ground that, by the original articles of copartnership, it was to continue, until dissolved by the death of one of the parties, or until two of them should demand a dissolution. According to the construction given to the articles by the appellants, they had a right to keep the capital of *Fitch* in their trade or concern, notwithstanding any assignment of his property to his creditors, and notwithstanding an actual insolvency on his part.

I was of opinion, that the partnership was dissolved by the assignment, and that the appellants were accountable for all the interest of *Fitch* in the capital and in the profits of the concern. I do not mean to say, that a voluntary assignment

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by *Fitch*, of his property to his creditors, may not be a breach of his contract or covenant with his copartners. *The question, as between them, under their articles of agreement, it was not necessary to discuss. But the creditors of one copartner, who take his property by assignment, or on execution, cannot be involved, against their consent, in the responsibilities of a copartnership. The capital stock, or interest of a partner, is certainly liable to his separate debts. His creditors are entitled to it without the risk and burden of being partners. An act of bankruptcy, says Lord *Mansfield*, (*Cowp.* 448.) is a dissolution of the partnership, not only by virtue of the statutes of bankruptcy, but from the necessity of the thing, *since assignees cannot carry on a trade*. According to the doctrine on the part of the appellants, a party may lock up his capital in a mercantile house, by such an agreement as the one in this case, and it must remain untouched, without the consent of his copartners, during his life. If the creditors take it by assignment, they must become partners in the firm, and can only touch the yearly profits, and must be liable to the yearly losses, and for all the engagements of the firm. This doctrine appears to me to be too unreasonable, and too inconvenient, to be endured.

There are special circumstances in this case, to show that here was a dissolution by the consent of the firm.

Fitch and *Marquand* were both directors of the bank of the respondents, and the latter was present at the board of directors at the time of the negotiations and arrangements which preceded the assignment, and he continued his attendance regularly at the board, long after the assignment and insolvency of *Fitch*. The respondents were not acquainted with the clause I have alluded to in the original articles of copartnership, until many months after the assignment: and during the negotiations that preceded it, *Fitch* frequently requested the board of directors not to dispose of his interest in the copartnership, or break up the same, but the board uniformly refused to take the assignment under any such terms or conditions; and the appellant, *Marquand*, was present at all the communications from *Fitch* to the board of directors, and never made any contradiction, or put forward the articles as an objection. His silence, under all these operations, ought to preclude him from questioning *the fair and natural effect of the assignment, as a dissolution of the concern, so far as *Fitch* and his property were involved.

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I, accordingly, declared, that the partnership was dissolved upon the assignment, and that an account ought to be taken upon that basis.

On the coming in of the master's report, exceptions were taken to it.

The three first exceptions related to the value given by him to the capital stock of the company

There was an inventory of the stock taken on the 15th of *October*, 1814, at the instance of the respondents, with a view to a settlement between the parties. It is not absolutely certain whether the value of the articles, as set down in the inventory, was intended to represent their then value, or the original cost. If it was intended to represent their value, at that time, there would seem to be no objection, for the object of the inventory and valuation was to lay the foundation of a settlement. There was then no depreciation of price, and no immediate expectation of peace. If, however, the value was, as the appellants allege, taken from the original cost, that must be a good criterion, in the absence of other proof. It must be deemed to have been, in the opinion of the parties, a true and correct rule of estimation, being the very one they must have adopted at the purchase, and commencement of the partnership, in *January*, 1814. Between *January* and *October*, 1814, there was no essential variation in prices, as the state of the country, and of its trade, remained the same.

If the proceeds of the stock would have been a better rule in taking the account, yet the appellants were unable to show, with any precision or certainty, what those proceeds were. The books of the company being called for, and produced before the master, could not show it, as the partnership stock and concerns were so blended with other transactions and sales, as not to be capable of discrimination.

The respondents were, therefore, compelled to resort to the original cost, as the best test of the value. No actual loss was shown, no depreciation, prior to the year 1815; and, *indeed, whether we resort to the cost, or to the value, they will be found to have been the same between the commencement of the partnership, in *January*, 1814, and the inventory in *October* following, when the appellants refused to deliver up the share of the property belonging to *Fitch*, even though an indemnity was offered for any loss on account of expenses.

The three first exceptions were, consequently, overruled.

The fourth exception states, first, that more was allowed for capital brought in by *Fitch*, than he actually advanced. This is a mistake in point of fact. The appellants admit that 6,475 dollars were brought in as charged, and the 341 dollars, afterwards withdrawn, were charged to the respondents.

It stated further, that the capital was chargeable only on the profits of the business. But this exception is contrary to the articles of copartnership, which declare, that the profit and loss, after refunding to *Fitch* 6,000 dollars, to be advanced by him, were to be divided, &c. The division of profit referred to in the articles, necessarily implied a previous reimbursement of the capital employed. It is no more than the

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equitable and ordinary principle of settlement applied to such cases.

The last exception related to the charge of interest ; but the allowance of interest on the amount justly due, upon a fair valuation of the stock appropriated by the appellants, seems to be too plain and ordinary a point to be susceptible of doubt.

The exceptions were, accordingly, overruled.

T. A. Emmet, for the appellants, contended, that the assignment by *F.* to the respondents, on the 23d of *April*, 1814, did not operate as a dissolution of the copartnership. According to the *sixth* article of the contract, there could be no dissolution, except by death, without the concurrence of two, at least, of the parties. The assignment being the single act of *F.*, if it is to have the effect of dissolving the partnership, is in direct violation of his express covenant, and must be void, as regards the rights of the other partners. *This is not a case of *bankruptcy* of one partner, or of an *execution* against him. It was a voluntary assignment to secure future debts ; and it was not understood or intended by the parties, that it should operate as a dissolution. This case, then, is clearly distinguishable from those cases, in which the property of one of the partners is acquired by a third person, by *operation of law*. The respondents consented to stand in the place of *F.* as partners, and the business could be carried on as well after the assignment as before. It is true, that the appellants, *M.* and *B.*, might have objected to receive the respondents as partners, in the place of *F.*, but they did not ; and the partnership went on, with the entire acquiescence of the respondents, from *April* to *October*. If losses had accrued to the concern, during that period, would not the respondents have been obliged to bear their share of them ? The assignment was purely voluntary, and to secure not only a present debt, but future advances ; if it was obtained from *F.* with a view to destroy the copartnership, it was a fraud on the appellants *M.* and *B.*

Again ; to give the respondents the full benefit of the assignment, it is not necessary that the partnership should be dissolved. *F.* was to have no personal interference whatever in the business. He furnished the whole capital, and the other two partners were to carry on the business, and after refunding the capital advanced out of the profits, the residue was to be divided between the partners. The assignment was intended merely to transfer to the respondents, the right of *F.* to receive the moneys, from time to time, payable by virtue of the articles of copartnership, and for which the appellants have always been ready to account. Again ; the insolvency of *F.*, which happened a month after the assignment, cannot be said to have dissolved the partnership ; for, having assigned all his

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interest to the respondents, he had ceased to be a partner, and was a mere stranger. IN ERROR.

Next, as to the *exceptions* taken to the master's report: Here the counsel discussed the exceptions at great length. ALBANY.
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**Wells*, contra. 1. The assignment from *F.* to the respondents, especially when followed by his insolvency, worked a dissolution of the partnership; and if the consent of *M.* and *B.* should be thought necessary, that is fairly to be inferred from the assignment and the negotiations between them and the respondents.

Where the partnership is general and without limitation as to its duration, either partner may put an end to it when he pleases. But the sixth article contains a limitation of a peculiar kind, and the question is, What is its reasonable construction? It is not denied that the *death* or *lunacy* of one partner would have put an end to the partnership: So, in case of a *bankruptcy* of one of the partners, where a bankrupt law exists. In all these cases, though the articles of copartnership are silent as to the events, the law provides for them. What is the reason that the *bankruptcy* of one partner works a dissolution? It is because all his *interest* in the concern is assigned to strangers. It is the *assignment* which operates the dissolution; it severs the *unity* of interest between the contracting parties. (*Fox v. Hanbury*, Cowp. 448. *Hague v. Rolleston*, 4 Burr. 2174.) In the case *ex parte Smith* (5 Vesey, 295.) the *attorney general*, *arguendo*, said, that "the *assignment* severed the joint tenancy." "From the moment it is executed, it has precisely the same effect as the *voluntary* assignment." The lord chancellor said, that the adjudication that the partner is a bankrupt, severed the partnership. In *Smith v. Stokes*, (1 East, 363—367.) Lord *Kenyon* said, "It was not the act of bankruptcy alone that dissolved the joint tenancy, but the act of bankruptcy followed up by the commission and *assignment*. Nothing passes to the assignees till the assignment; but when that is executed, they are in, by legal relation, to the time of the act of bankruptcy." The respondents are *trustees* for all the *stockholders* of the company. Like the *assignees* of a bankrupt, they are *trustees*, not partners. It can never be tolerated, that one of the partners, by assigning his interest, can introduce any person he pleases, into the partnership. The respondents act under a *banking* charter. Can they lawfully carry on trade, or be concerned with *M.* and *B.* as partners in their business? *If they can become partners, then the former partnership is at an end, and it is a new contract of copartnership, without any articles or limitation whatever, for the respondents are not parties to the former contract; and either party may, then, put an end to this partnership, whenever he pleases.

In principle, there can be no difference, as to its operation

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and effect, between an assignment under a statute of bankruptcy, and a voluntary assignment by one of the partners of all his interest in the partnership. If the doctrine of the respondents' counsel was to prevail, the creditors of one of these partners could not touch his interest, by an execution, without the consent of his copartners. It is true, if the assignment is fraudulent and collusive, and merely for the purpose of breaking up the copartnership, it would be void, and of no effect. But a *bona fide* assignment must stand, though its effect, like that of an assignment under a bankrupt law, is to dissolve the partnership. Such is the rule of the civil law, (a) (*Just. Inst. lib. 3 tit. 26. s. 8.*) and such is the doctrine of the Supreme Court. (*Murray v. Bogert*, 14 *Johns. Rep.* 318. *Ketchum v. Clarke*, 6 *Johns. Rep.* 144.) Indeed, the contrary doctrine is unfounded in principle, and would be too dangerous to be tolerated.

The counsel then examined the evidence in the case, and contended, that it sufficiently appeared, that *M.* and *B.* consented to the assignment and dissolution, and that the parties having acted advisedly, could not now set up any pretence of ignorance or misapprehension.

He then proceeded to discuss the exceptions to the master's report, which he said was correct, and fully supported by the evidence.

WOODWORTH, J. The first question to be decided is, whether the legal effect of the assignment is such as to dissolve the partnership.

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**Fitch* may have violated his engagement with his partners, by transferring his interest, but we are not called on to express any opinion on that point. Third persons claim *Fitch's* interest and property in the concern, and are entitled to receive it, if the partnership was at an end.

It is well settled in *England*, that an act of bankruptcy is a dissolution of partnership; this is by reason of the assignment, which severs the interest of the bankrupt, by operation of law. (*Cowper*, 448. 4 *Burr.* 2174. 5 *Ves. jun.* 295. 1 *East*, 163.)

An assignment made by the party himself, under circumstances like the present, produces the same result; in both cases, they give rise to a state of things altogether incompatible with the prosecution of a partnership concern, commenced, and previously conducted, by the bankrupt and his former copartners. It is perfectly clear, that a new partner cannot be admitted without consent. This, *ex vi termini*, implies, that

(a) "Item, si quis ex sociis mole debiti prægravatus bonis suis cesserit, et ideo propter publica et privata debita substantia ejus vaneat, solvitur societas. Sed hoc casu, si adhuc consentiant in societatem, nova videtur incipere societas" (*Inst.* 3. 26. 8.

even consent would be nugatory, unless the assignee elected to become a partner: where he does not so elect, but (as in the present case) insists on a division of the property, the demand, according to acknowledged principles, cannot rightfully be denied. That a rule of this kind will, in some cases, and probably in the present, bear hard on the partners opposed to a dissolution, is not to be doubted; but its inconveniences are more than counterbalanced, by the superior benefits arising from its application.

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There is another insuperable difficulty opposed to a continuance of the partnership, and that arises from the character in which the respondents are placed. How can they become partners with *Marquand & Barton*? They are a corporate body, and act as trustees for the benefit of the stockholders. The bank had no power to become partners with the appellants; it was not within their corporate privileges. It will not be pretended, that in the situation *Fitch* was placed, he had not a right to assign his interest, and that it passed under the assignment to the respondents. I conclude, therefore, that the assignment by *Fitch*, *per se*, dissolved the partnership. In the case of *Ketchum and Black v. Clark*, (6 Johns. Rep. 144.) where one of the partners had executed an assignment of all his right in the partnership *property and debts, it is said, that “*this act was, of itself, a termination of the partnership;*” but there being no evidence of any public notice of the dissolution, nor any special notice to the party afterwards dealing with the firm, *on that ground* the partners were held liable. As between themselves, the point appeared to be conceded.

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In my view, the question must be decided upon the operation of the assignment itself; for, although *Marquand* was one of the directors, and present at all the communications from *Fitch* to the board, his consent cannot be inferred from his silence; because, it manifestly appears, from the acts and declarations of *Fitch* and the directors, that *the actual consent* of two of the partners was not, by them, considered to be necessary; the solicitation of *Fitch* not to break up the establishment, was, undoubtedly, founded on his belief, that by force of the assignment they possessed the right, and the refusal of the directors is evidence that they entertained the same opinion; but it no where appears, that the respondents ever made an attempt to obtain the actual consent of the parties. Had this been done, and had *Marquand* made no objections, but remained silent, his conduct would have afforded grounds to infer his acquiescence; but while the negotiations were going on between *Fitch* and the respondents, from which it appears they considered the dissolution as a consequence of the assignment, *Marquand* was not called on to speak; they did not profess to derive any thing from actual consent, and, therefore, his silence shall not now preclude him from questioning the authority exercised by the respondents; neither does

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the answer of *Marquand and Barton*, to the note of *Greene*, the cashier, indicate any thing more, than that they held themselves responsible to the respondents, for the interest they acquired under the assignment of *Fitch*; nothing more was then required of them, and to that they must submit, however prejudicial to their individual interest.

From the preceding view of this cause, I am of opinion, that the decree dissolving the partnership, and for taking an account upon that basis, was correct.

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The remaining question arises on the exceptions taken to the master's report. In ascertaining the balance due to *the respondents, the master has taken the valuation contained in the inventory, made by the parties in *October*, 1814, which, it is understood, corresponds with the original cost or value of the partnership property. *In the absence of other proof*, he has adopted it as the true value, in *October*, 1814.

It will be recollected, that the claim of the respondents was not, in the first instance, to demand payment of a certain sum of money, but to break up the establishment, and receive *Fitch's* proportion of the property and effects.

David I. Greene testified, that he called on the appellants for this purpose; that the inventory was made to ascertain the amount, with a view to an arrangement, and that he "*offered to the appellants, to take the whole concern, and release them from all claim on account of Fitch's advances, and to indemnify the appellants against the debts of the concern.*" This offer was made in order to protect the appellants against loss, in consequence of fixtures, and some bad purchases. The proposition was declined by the appellants. They, consequently, became liable to pay the cash value in *October*, 1814, which it seems they preferred to the delivery of the property. The depreciation, in consequence of peace, cannot affect the question, because that happened several months after the demand and refusal. Neither are the appellants entitled to a deduction, on the ground that, had the articles been sold at public sale, a loss of thirty per cent. would have ensued. The respondents cannot, in justice, be bound by this test, neither can the appellants rightfully demand it. The respondents, in the first instance, merely claimed the delivery of the goods; if their request had been complied with, the question of value could not have arisen; but the appellants, objecting to this, cannot be permitted to say, we will retain the property, and if perchance we are made liable, the measure of damages shall not be according to the value of each article, but be governed by a calculation of loss, which is always consequent upon a sale at auction, of the remnants of a stock in trade. The appellants, having refused to deliver the goods, cannot make a forced sale the measure of damages, but must answer to the respondents according to the value in the ordinary course of business.

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*The true value, then, in *October*, 1814, must be the criterion

It was competent for the appellants to show, that the invoice price was too high, and could they have succeeded in that, they might claim a deduction; but having failed to do so, the question now is, whether the master was not justified in adopting the prices set forth in the inventory, which had been taken by the parties. Not a year had elapsed since the partnership commenced, and the war continued; and there could be no well founded calculation when it would terminate, so as to produce a depression of value. On the whole, I am of opinion, that the principles on which the master made his report were correct, and that the decree of his honor the chancellor ought to be affirmed.

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This being the unanimous opinion of the court, it was, thereupon, ORDERED, ADJUDGED and DECREED that the decree of the Court of Chancery be affirmed; and that the appeal be dismissed; and that the appellants pay to the respondents, for their costs, in defending this appeal; and that the record be remitted, &c.

April 27th.

Decree of affirmance.

JACOB RHINELANDER, *appellant*,
against

JOHN BARROW, THOMAS BUCKLEY, and SAMUEL M.
HOPKINS, *assignees of EDMUND PRIOR, a bankrupt,*
respondents.

APPEAL from the Court of Chancery. The pleadings and proofs in the court were voluminous. The facts material to be stated will be found in the opinion of this court, *and in the report of the case in the court below. (*Vide S. C. 1 Johns. Ch. Rep. 550—560. and 3 Johns. Ch. Rep. 614—687.*)

P. being indebted to R. in February, 1799,

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delivered to him the bond of B. as collateral security for the debt. The obligor, in 1802, offered, as the only means in his power, to pay R. the amount of the bond in land, at a certain price, or at a fair valuation, which he refused to accept, though P. expressed his

T. A. Emmet, for the *appellant*.

Hoffman and Boyd, for the *respondents*.

YATES, J. The respondents filed their bill as assignees of Edmund Prior, a bankrupt; who, it appears, while a merchant, in embarrassed circumstances, borrowed at different times of the appellant, then his confidential clerk, several sums of money, and gave various bonds and securities for such loans.

Readiness to accept the offer, and one of his assignees, (P. having become a bankrupt,) offered to indemnify R. for any loss that might arise on a fair sale of the land, if he would accept of B.'s offer. B. became insolvent, so that the amount of the bond was lost: *Held*, that R., by his refusal to accept the offer of payment in land made by B., did not, under the circumstances of the case, render himself liable for the amount of the bond to P. or his assignees.

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The court below ordered the bonds, obligations and settlements to be set aside, and all the accounts between the 27th of November, 1790, the time of the commencement of their dealings, and the 4th of July, 1801, to be opened, not only on the ground of usury, but also for mistakes and omissions, and for undue advantage taken of the necessities of the principal; and referred the whole to a master, who was directed to allow "rests," in stating the account, at the period of liquidation between the parties: that the interest then due should be considered as principal, and that the appellant should be charged with the amount of all the securities assigned to him which had been paid, or which he had refused to deliver to his principal for collection, or which had been lost by his negligence, default, or want of diligence in collecting them, with interest.

The unusual security taken at different times, various in kind and enormous in amount, according to the debt from time to time due and owing to the appellant; the charges made, not covered by the calculation of simple interest, but resort had to compound interest to support them, and other apparent deficiencies, show conclusively, that the acts of the appellant appeared oppressive, and called for a strict investigation. The chancellor, therefore, correctly ordered the special reference to the master as before stated. Numerous cases go to show, that accounts have frequently been ordered to be opened after a longer period than the present; where, as in this case, it appeared that undue advantages had been taken of the peculiar situation of the party. In **Bosanquet v. Dashwood*, (*Cases temp. Talbot*, 37.) usurious agreements were made and repeated from 1710 to 1724. The accounts were ordered to be opened, and the demands reduced to money really lent. So, in *Vernon v. Vawdry*, (2 *Atk.* 119.) the whole account was opened after a period of 23 years. The same principles governed the decision in a number of other cases cited by the respondents' counsel, in the argument of this cause in the court below. (1 *Johns. Ch. Rep.* 555.)

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The accounts, then, having been properly ordered to be opened, and referred to a master, it appears, that on the coming in of the master's report, six exceptions were taken to it by the appellant; after hearing of the parties on those exceptions, the chancellor allowed the first, modified the fifth, and disallowed the remaining four. This decree, together with the one made the 29th of September, 1815, are the subjects of the appeal now before this court. The second exception is, that the master ought not to have reported that he had ascertained that the appellant took from the said *Edmund Prior*, before his bankruptcy, without permission, certain securities for the payment of money.

The bill states, that the appellant, while he had possession of the valuable papers of *Prior*, without the knowledge or consent of *Prior*, took several notes and obligations, sealed and

unsealed, belonging to *Prior*, which were never assigned or delivered to the appellant; and among other things, prays, that the appellant may be charged with the amount of all notes, bonds, and obligations wrongfully taken or detained by the appellant, and of all those assigned to him which, from his negligence or default, became precarious.

It does then appear, that the relief sought with regard to those securities, is not, as urged by the appellant's counsel, on the *sole* ground of the debts having become precarious from the negligence or default of the appellant. It is also grounded on the liability of the appellant to be charged with the amount of those notes, occasioned by his wrongful act in taking them, without the knowledge or consent of *Prior*; and the directions in the decretal order, referring it to the *master, required him to make the charges according to the prayer of the bill. The master, therefore, correctly reported, that he had ascertained the fact, that the appellant had taken securities belonging to *Prior* without his permission.

It is alleged, in the fourth exception, that the master ought not to have reported as he did with regard to the balance of \$190, due, on the 16th of *September*, 1796, on *Seaman and Avery's* note; and in the 6th exception, as to \$81 and 44 cents, the amount of *David Barnum's* note. It cannot be questioned, but that those two notes were unassigned and unendorsed when taken out of *Prior's* possession by the appellant, because he expressly admits it in his answer. The correctness of the chancellor's decision, in disallowing those exceptions, must consequently depend on the truth of the alleged facts, that those notes were taken without *Prior's* knowledge or permission, and that the payers were solvent on the 4th of *July*, 1801.

The testimony authorizes the conclusion, that the notes were taken as alleged in the bill, notwithstanding the denial of it by the appellant in his answer. *Edmund Prior*, to whom those notes at that time belonged, testifies, that they were taken from his possession without his knowledge or consent; and when he missed them, in *March*, 1801, the appellant refused to give him an account of them. That a number of notes were taken out of the desk of *Prior*, and that the appellant refused to give a list of those securities, are facts strengthened by the testimony of *William Prior*; and as to the demand and refusal, that is fully confirmed by *Robert Bowne*. This alone would be sufficient to show the nature of the transaction: but in addition to those facts, taking into view the improbability that such permission should have been given, from the circumstances, that neither of the notes in question was endorsed or assigned; that no account had been kept of them, which must have been known to the appellant when he refused to give information to *Prior*, by furnishing him with a list of them, must be sufficient, in opposition to the answer, to

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establish the fact, that the notes were taken without the previous knowledge or consent of *Prior*.

*By the 18th article of the first agreement between the parties, it is stated, that the appellant is not liable to pay the amount of any of the securities mentioned in the answer, the payer of which was insolvent on the 4th of *July*, 1801; the appellant, however, is to account for any sums of money he may have received as dividends upon the estate of such insolvent payer.

The testimony shows conclusively, that *David Barnum's* note is not excluded by this article in the first agreement, as his solvency after the 4th of *July*, 1801, cannot be questioned; and it is equally clear that the appellant ought to be charged with the amount of this note.

Prior and *Barnum* both state, that in the autumn of 1801, *Barnum* called upon *Prior* to pay off his note; and finding that *Prior* had it not in his possession, *Barnum* refused to pay it. The wrongful taking of this note, therefore, out of *Prior's* possession by the appellant, caused the non-payment, and consequently the loss of the debt, and that was sufficient to render him liable. The statement in his answer, that in 1801 he made a personal demand upon *Barnum*, who refused to pay, on account of notice from *Prior* not to do it, cannot be relied on, because *Barnum*, upon his examination, confirms what *Prior* says, and contradicts the appellant's statement. He says, that he remembers the offer to pay *Prior*, and his refusal, on finding the note could not be produced; but he has no recollection that the appellant had applied to him personally for payment, or that *Prior* ever forbade him not to pay the note to the holder.

The appellant had misconducted himself, and the assignees were not obliged to accept the tender of the note made to them in *April*, 1802. Admitting that *Barnum* was then solvent, they had a right to look to the appellant for the debt; and I can see no reason why he should not be charged with the whole amount of principal and interest due on the notes.

The note of *Seaman and Avery* is also not endorsed nor assigned; and the appellant states, that *Richard Seaman*, one of the payers, died insolvent before it came into his hands; and that *Elijah Avery*, the other payer, also died insolvent, shortly after the note came into his hands; that he cannot

*state the particular times when the unendorsed or unassigned notes were taken by him; but that the whole of them came into his possession between the date of the third assignment, which is stated to be the fourth of *February*, 1799, and the 10th of *June*, 1801. *Elijah Avery* must have died before the 9th of *September*, 1802; because on that day administration was granted on his estate. The appellant admits the note to have been in his hands before the 10th of *June*, 1801, and from the testimony it is evident that *Avery* was solvent at that time, and

remained so until his decease; for by the proceedings of the Probate Court of the district of *Rutland*, in the state of *Vermont*, it appears, that on a settlement of his estate, there remained near \$900 for his children, after paying all the expenses to the guardian for adjusting and managing the estate. *Amasa Paine* wrote, according to the information he had obtained as late as *October*, 1804, which he no doubt believed to be true, that *Elijah Avery* died insolvent, and that nothing could be obtained from the estate. It might have been so reported at the time; the fact, however, is otherwise. *Avery* was solvent on the 4th day of *July*, 1801; so that this note is not excluded by the 18th article of the first agreement, and the appellant is liable for the amount, on the principles before stated with regard to *Barnum's* note.

The fifth exception is, that the appellant is charged as of the 18th of *December*, 1798, with 6,114 dollars, as, and for the balance due on *Samuel Beman's* bond, assigned to him by *Prior*, and which bore date the 11th of *April*, 1795. This balance was modified by the court below, and reduced to the sum of 5,352 dollars, as of the 1st of *September*, 1802. The above-mentioned bond of *Samuel Beman*, was for 2,055 pounds, and had been assigned to the appellant on the 4th of *February*, 1799, as a collateral security of the debt due from *Prior* to him. It is urged, that he is chargeable with the amount of the balance due on it, for improperly refusing to accept of offers made to him of lands in payment of this bond, whereby the debt became wholly lost.

It appears that in *June*, 1802, *Beman*, by his agent *Melancthon Wheeler*, made an offer to the appellant of a tract of land containing 1,338 acres, lying in the town of *Hampton* *in the county of *Washington*; which, in *Beman's* opinion, was worth four dollars per acre, and, also, of a tract of 800 acres, lying in *Clinton* or *Essex*, at the valuation of men, to pay and satisfy this demand; and that *Wheeler*, at the same time, told him, that *Beman* declared himself unable to pay the demand, unless the appellant would receive payment in lands. *Wheeler* says, he does not know what title *Beman* had to the lands, nor does he recollect that he ever conversed with *Prior*, or any of his assignees, in relation to the offer of lands to the appellant. That the appellant declared he could not accept the proposal, since he held the debt as a security for a demand he had against *Prior*. *Wheeler* further states, that *John Williams* held a judgment, by assignment from one *Mitchell*, against *Beman*, and that he heard *Williams* declare he would release those lands from the effect of his judgment, for the purpose of relieving *Beman*, provided his creditors would accept them in payment of their demands. This differs, in a material point, from *Prior's* statement. He does not say that *Williams* offered to release on that condition, but that *Williams* applied personally, in behalf of *Beman*, to him, and wished to settle the bond by

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giving a certain portion of *Beman's* land, on which he had a prior judgment in satisfaction of the debt, and offered to release the land from the judgment; that he (*Prior*) consented to it, but the appellant refused, and with the assent of one of the assignees, he offered that the assignees, according to the best of his (*Prior's*) recollection, should indemnify him against any loss, upon a fair sale of the land; but the appellant would not consent. *Beman* also states, that in the spring of 1802 he wrote to the appellant, and offered him about 3,000 dollars worth of land, and 2,000 dollars in obligations; or if he would wait for his pay ten years, he would pay the whole of the bond, which proposition the appellant also refused to accede to.

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There can be no doubt, that those offers were made; but I cannot discover the grounds upon which the appellant is to be made liable for the balance due on this bond; his refusal to take the lands in payment, or to accept either of the propositions made to him, could not create such liability. The bond was assigned to him as collateral security; *and it cannot be questioned that his debt, at the time those proposals were made, far exceeded any amount those lands could be fairly appraised at. And although he might have had other securities for what was due him, yet he had a right to prefer either of them, and insist on payment according to the condition of the bond; and as *Prior* and the assignees both had notice of the offer, they might have paid him the amount due on it, and have taken the lands, if his refusal endangered the debt. The offer of one of the assignees, and according to the best of *Prior's* recollection, made in behalf of the rest, to indemnify him, did not make it obligatory on his part to comply with *Beman's* proposal.

I have thus placed the question with regard to *Rhinclander's* conduct, on the broad ground of legal right in him to do as he did. But it is extremely questionable whether, in the exercise of reasonable discretion, his conduct, in this instance, ought to be viewed as perverse and unconscientious. It must be recollected that *Beman* was much embarrassed in his affairs, and that there were several judgments against him at the time, and that some of them were not wholly satisfied. That after the bond was given, and before he assigned it to the appellant, *Prior* himself had included the amount in a judgment bond he took from *Beman*, of which it seems he was not unwilling advantage should be taken, as appears by his letter of the 29th of March, 1802, to *Beman*, after *Beman* had been sued on the original bond. He states, that he thinks *B.* may availingly plead the bond and judgment taken by *P.*; that it being of higher authority, he supposed it would furnish *B.* with a sufficient plea to place him in security respecting it.

This shows, that all the parties concerned did not consider the appellant as having the absolute control of the *Beman* debt. It would have been resorted to as a shield to protect *Beman*

at law. The letter from *Zebulon R. Shepherd*, to *William N. Dykman*, admitted as evidence by the consent of both parties, shows that *Beman* contemplated to make use of it in his defence. *Shepherd* says he knows that a suit was brought against *Beman*, in the name of *Prior*, which *Beman* supposed to be bottomed on a bond assigned to *Rhineland*, and that a statement was shown to him in *the hand-writing of *Prior*, proving that the bond had been merged in a judgment to him, as trustee from himself and other creditors; that *Beman* designed, in the outset, to defend, on the ground that the judgment extinguished the bond; but, soon after, concluded to be prosecuted by his friend, *John Williams*, as a bankrupt.

From the whole of this, it is evident, that the appellant was justified in not assenting to the arrangement proposed; and the correct course would have been for the assignees, who must have known the true situation of the debt, to have paid him the amount of the bond, and thus to have taken the risk of the compromise upon themselves. This they did not think proper to do, and it would be unjust that the appellant should now be held responsible for the balance due on it.

In addition to what has been shown, there is another view of the case, from which it is clear that the appellant ought not to be deemed liable. It seems to me, that the facts disclosed warrant the inference that *Beman* was insolvent on the 4th of *July*, 1801; and if so, it brings the debt within the agreement of the counsel already mentioned, by which it is stipulated, that the appellant shall not be liable to pay the amount of any of the securities mentioned in the answer, (of which *Beman's* bond is one,) the payer of which was insolvent on that day.

Zadock Wheeler, one of the firm of "*Scott, Beman & Wheeler*," testifies, that he was acquainted with the affairs of *Samuel Beman* on the 4th day of *July*, 1801, and he then thought, and still verily believes, that he was then insolvent. *Peter P. French* testifies, that he was well acquainted with *Samuel Beman* at that time, and was a near neighbor to him, and had frequently, as well before that day, as often after, heard him converse about his circumstances and affairs; and from those conversations, as well as from general report, he understood, and was informed, that *Beman* was insolvent on that day, and for a considerable length of time before; which information he then believed and still believes to be true. That he was informed by *Pliny Adams*, since deceased, the sole assignee of *Beman*, that he never realized any thing from his estate. *Beman* himself declares, that the persons *composing the firm of "*Scott, Beman & Wheeler*" were insolvent on the 4th of *July*, 1801; but exonerating him from any liability to pay the debts of the firm, he should consider himself to have been able, if his creditors would have received his property at a fair valuation, to pay all his just debts on that day, and thus far considered himself solvent; but that he was not, at that time,

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able to pay all his just debts, including those of *Scott, Beman & Wheeler*; and that after the sale of his land upon execution, on the judgment in favor of *Williams*, he had no lands remaining, except the equity of redemption as to the lands in *Vermont*.

It appears to me, that the testimony is conclusive to show, that *Samuel Beman* was insolvent on the 4th of *July*, 1801, and I can discover no solid reason, why this is not a case within the meaning of the stipulation entered into by the parties. Admitting that the provision in the agreement was intended to meet a charge of negligence, and to afford a test of the absolute inability of the parties to pay, at a given time, the refusal to accede to the offer of payments in lands from a person in the embarrassed situation of *Beman*, could not render the agreement inoperative. The appellant, in the exercise of sound discretion, refused to accept of the offer, and was not called upon to object to the title, although the case shows that it must have been extremely questionable; and that alone would authorize a rejection; so that, in fact, the refusal of it was a sufficient objection to the title.

Upon the whole, my opinion is, that the appellant ought not to be charged with any part of the balance due on *Samuel Beman's* bond, dated the 11th of *April*, 1795, assigned to him by *Edmund Prior*, on the 4th of *February*, 1799. That, consequently, the decree of his honor the chancellor ought to be reversed, as far as it relates to that bond; that the cause be remanded, so that the decrees and decretal orders in the court below may be modified, and carried into effect accordingly.

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This being the unanimous opinion of the court, it was thereupon ORDERED, ADJUDGED and DECREED, that the decretal order of his honor the chancellor, made in this cause, be in all things affirmed, except so far as relates to the *fifth* exception taken to the master's report in this cause, on the part of the appellant, and which relates to the balance due on the bond of *Samuel Beman*, mentioned in the pleadings and proofs in this cause. And it is further ORDERED, ADJUDGED and DECREED, that the said *fifth* exception be allowed as well taken; and that the decretal order of the Court of Chancery, so far as the same orders and directs the debt due by the said *Samuel Beman*, or any part thereof, to be charged to the appellant, and to be allowed to the respondent, in taking the account in the cause, be reversed; and that in stating the account between the parties in this cause, the appellant is not to be charged with the debt or bond of the said *Samuel Beman*, or with any part thereof; and that the record and proceedings be remitted, &c.

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JOHN D. JAQUES and ROBERT JAQUES, *appellants*,
against
 The TRUSTEES of the METHODIST EPISCOPAL CHURCH
 in NEW-YORK, and others, *respondents*.

APPEAL from the Court of Chancery. The bill filed by the respondents, on the 10th of *March*, 1813, against *the appellants and *Henry Cruger*, was for an account of the real and personal estate of *Mary Jaques*, deceased, late the wife of the appellant *John D. Jaques*, and who was formerly the wife of *William Alexander*, deceased. It stated, that *Mary Jaques*, at the time of her intermarriage with the defendant, *J. D. Jaques*, was seised and possessed of a large real and personal estate, particularly mentioned in the bill; that, in contemplation of the marriage about to take place between her and *J. D. Jaques*, a deed of marriage settlement was made and entered into, between *Mary*, of the first part, *John D. Jaques*, of the second part, and *H. Cruger*, of the third part, dated the 25th of *September*, 1805, by which the said *Mary* conveyed all her estate, real and personal, to the defendant, *Cruger*, to the use of the said *Mary*, until the marriage should take place, and from and after the marriage to the use of such persons, and for such estates, as she, with the concurrence of her intended husband, should, by deed, attested by two witnesses, or by her last will and testament, limit and appoint; and, until such appointment, to the use of *H. Cruger* and his heirs, during the life of the said *Mary*, to enable her to take the profits thereof, free from the control of her husband, and at her absolute disposal; that, immediately after the execution of the deed, the marriage took place between the parties. The bill alleged that, after the intermarriage, *J. D. Jaques*, during the lifetime of his wife, by artful contrivances, possessed himself of her personal estate, and of the rents and profits of her real estate, and applied the same to his own use, changing the securities for money, and taking new securities in his own name; and appropriated the money belonging to his wife, in purchasing real estate, the titles to which he took in his own name, and claimed them as his own; that, among the securities so held

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in a cause opens
 for the consid-
 eration of this
 court, all prior
 or interlocutory
 orders or de-
 crees, in any
 way connected
 with the merits
 of the final de-
 cree.

A final de-
 cree is that
 which is made
 when all the
 material facts
 in a cause have
 been ascertain-
 ed, so as to en-
 able the Court
 of Chancery to
 understand and
 decide on the
 merits of the
 case.

A *feme co-*
vert, with re-
 spect to her sep-
 arate estate, is
 to be regarded,
 in a court of
 equity, as a
feme sole, and
 may dispose of
 her property,
 without the con-
 sent or concu-
 rrence of her
 trustee, unless
 she is specially
 restrained by
 the instrument
 under which
 she acquires
 her separate es-
 tate.

And though a particular mode of disposition be specifically pointed out in the instrument, or deed of settlement, it will not preclude her adopting any other mode of disposition, unless there are *negative* words restraining her power of disposition, except in the very mode so pointed out.

Therefore, if she enters into any agreement, clearly indicating her intention to affect by it her separate property, a court of equity, if there be no fraud, or unfair advantage taken of her, will apply her separate property to satisfy such engagement. And she may give it to her husband as well as any other person, if her disposition of it be free, and not the result of flattery, or force, or improper treatment. As where the wife agreed to defray the expenses of the family establishment, the husband is not only not accountable for the moneys received by him of his wife, and expended for that purpose, but is to be allowed for all advances by him for that object, and for the necessary repairs of her estate.

Where a deed of marriage settlement was duly executed by the parties, and laid on the table, and the wife, as *cestui que trust*, took it up and kept in her possession until her death, it was held, under the circumstances, to be a good and valid delivery of the deed

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25th of *September*, 1805, made by and between *Mary*, late wife of *John D. Jaques*, of the first part, the said *John D. Jaques*, of the second part, and *Henry Cruger*, of the third part, *was duly executed, and is a valid instrument in law, for the uses and purposes therein mentioned*; and under and by virtue of which deed, the estates real and personal of the said *Mary* were secured to her sole and separate use, according to the tenor of the said deed; and the real and personal estates of right belong, and are distributable according to the last will and testament of the said *Mary*, late the wife of the said *John D. Jaques*, made under the power in the aforesaid deed for that purpose contained, and according to the deed in the pleadings also mentioned, made by the said *John D. Jaques*, and the said *Mary*, lately his wife, of the one part, and the said *Robert Jaques*, of the other part, bearing date the 12th of *September*, in the year one thousand eight hundred and twelve. And it was further decreed, that the freehold estate, situate adjoining *Warren street*, in the city of *New-York*, mentioned in the pleadings in this cause, the title to which stands in the name of the *said *John D. Jaques*, which title he acquired from a master in chancery, in consequence of a sale thereof, under a decretal order of this court, and also the leasehold estate, situate adjoining *Murray street*, in the city of *New-York*, likewise mentioned in the pleadings in this cause, the title to which stands in the name of the defendant *Robert Jaques*, and which title he acquired from the said *John D. Jaques*, by assignment, as in the pleadings mentioned respectively, of right belong to the said *Mary*, late the wife of the said *John D. Jaques*, and constitute part of her estate, secured to her separate use, by the said deed of the 25th of *September*, 1805; and the said last mentioned estates respectively of right belong, and are distributable, according to the aforesaid deed, to the said *Robert Jaques*, of the twelfth of *September*, one thousand eight hundred and twelve, and the last will and testament of the said *Mary*. And for the purpose of such distribution of the aforesaid estates respectively among the complainants, the trustees of the *Methodist Episcopal church*, in the city of *New-York*, and the complainants *Hannah Maria Brown*, *Mary Alexander Brown*, *Evelina Truxton Brown*, *John Conway Brown*, and *Washington Brown*, the infants, and the defendant *John D. Jaques*, according to their respective rights, under the said deed to the said *Robert Jaques*, of the twelfth of *September*, one thousand eight hundred and twelve, and the said last will and testament of the said *Mary*, late the wife of the said *John D. Jaques*. This court doth further order, adjudge and decree, that the said premises in the pleadings mentioned, situate at the corner of *Broadway* and *Reed street*, and the premises in the pleadings mentioned, situated adjoining *Broadway* and *Crosby street*; and also the freehold estate, situate adjoining *Warren street*, the title whereof stands in the name of the said *John D. Jaques*; also the said leasehold estate, situate adjoining *Murray*

street, standing in the name of the said *Robert Jaques*, be sold at public auction, under the direction of a master in chancery, he giving at least six weeks previous notice of the time and place of such sale, in one or more of the public newspapers printed in the city of *New-York*; that all proper parties join in competent deeds and conveyances to the purchasers *thereof, and that he deposit the moneys arising from such sales with the assistant register, to abide the further order of the court relating thereto. And it is further ordered, adjudged, and decreed, that the said *John D. Jaques* shall account with the complainants for the rents and profits of the said real estates respectively, that is to say, for the said real estate situate at the corner of *Broadway* and *Reed street*, from the decease of the said *Mary*, his late wife; and for the said real estate adjoining *Broadway* and *Crosby street*, from the time of the intermarriage between the said *John D. Jaques*, and the said *Mary*, his late wife; and for the said real estate adjoining *Warren street*, from the first day of *March*, 1810, the time when he took a title to the same from a master in chancery, as mentioned in the pleadings in this cause; and that the said *John D. Jaques* and *Robert Jaques* shall likewise respectively account for the rents and profits of the said leasehold estate, situate adjoining *Murray street*, standing in the name of the defendant, *Robert Jaques*, from the day last mentioned, according to the time they shall respectively have been in possession, or the receipt of the rents thereof; in taking which account of rents and profits, the said *John D. Jaques* and *Robert Jaques*, respectively, shall be charged with what they have received, or ought to have been received by them respectively, or may have been lost by reason of misconduct, or wilful default in relation thereto; and that in relation to the said freehold and leasehold estates, adjoining *Warren street* and *Murray street*, in taking the accounts of the rents and profits thereof, the master shall make just allowances to the said *John D. Jaques* and *Robert Jaques*, respectively, for all improvements by them made thereon, which are of a nature to be permanently useful, or increase the value thereof. And it is further ordered, adjudged and decreed, that the defendant, *John D. Jaques*, shall account with the complainants for all the personal estate of the said *Mary* his late wife, which belonged to her at the time of their intermarriage, and which has come to his hands since the said marriage; and that in taking the said account of the personal estate, the said *John D. Jaques* shall only be charged with the principal sums of money he may have received, *and interest from her decease, and not with sums received as interest, or dividends arising from the said *Mary's* personal estate during her life; and the said *John D. Jaques* shall, on taking this account, have all just allowances for any sums expended out of the said principal moneys, and rents, and profits, in improvements of, and for repairs and taxes on the real estates of the said *Mary*, which she had at the time

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of the intermarriage between her and the said *John D. Jaques*, or otherwise expended for her in the purchase of any goods and chattels by her special direction in each particular case, and apparently for her benefit; but that the said *John D. Jaques* shall not have any allowance for expenditures in the maintenance of the said *Mary*, her family, or equipage, during the time she was the wife of the said *John D. Jaques*. And it is further ordered, adjudged and decreed, that it be referred to a master in chancery, to take the accounts as before directed, and to report thereon to the court with all convenient speed, and that the master have power to examine each or either party upon interrogatories, or otherwise, under oath, and to compel the production of all books and papers by either party, which may be necessary in taking the accounts, and that the question of costs, and all further directions, be reserved till the coming in of the master's report."

It being, afterwards, discovered, that some of the property advertised for sale, by the master, pursuant to the decretal order above-mentioned, had been mortgaged, further directions were given to the master, by an order of the 5th of *October*, 1815. In pursuance of these orders, the master (*F. Ball*) proceeded in taking the accounts, and continued until *March*, 1816, when he died, without having completed them. On the 29th of *April*, 1816, an order was made, by consent, directing the proceedings to be continued before another master, to perfect the conveyances, &c., and to complete the account; pursuant to this order, the master, (*F. Arden*), on the 10th of *April*, 1817, made his report, to which the respondent took exceptions, and on the rehearing as to the exceptions, presented a petition, on which the chancellor, on the 29th of *September*, 1817, made an order, giving directions as to the disposition of some of the property, *in the hands of the assistant register, and the master. The exceptions to the master's report were eighteen in number; the chancellor, after argument, made a decree, the 12th of *November*, 1817, in which some of the exceptions were allowed, and the others disallowed: (3 *Johns. Ch. Rep.* 77—120.) and the report was ordered to be re-committed

to the master, for the purpose of being amended in conformity to the decretal order so made. On the 16th of *January*, 1818, the master made his report, pursuant to the said decretal order. By this report, there was found due from the appellant, *John D. Jaques*, individually, to the respondents, on the 10th of *April*, 1817, \$4,493 and 47 cents, besides the sum of \$1,745 and 19 cents due *J. D. J.* and *R. J.*, according to the master's former report, not excepted to in that respect. On the 15th of *June*, 1818, the cause came on to be heard on the master's report and further report, and the equity reserved, and the question of costs; and the chancellor, on the same day, made his final decree, by which the aforesaid sums, amounting to \$6,238 and 66 cents, with interest thereon, from the 10th of

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April, 1817, were directed to be paid to the respondents, together with their shares of other moneys which had arisen from the rents of property adjoining *Broadway* and *Crosby street*, in the city of *New-York*, and the sale of some of the personal estate of *Mary Jaques*, and some of her outstanding debts which had been collected and paid into court pending the suit; and further, that the appellant, *J. D. J.*, should pay the costs of the suit. From this decree the appellants appealed to this court. The respondents, also, filed a cross appeal. The counsel for the appellants moved to bring on the hearing of the appeal, when

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S. Jones, jun., for the respondents, objected to the appellants being heard in the cause, as it appeared from their record, that they intended to bring in review all the several *interlocutory orders and decrees* made in the progress of the cause, and more than *fifteen days* before the appeal was filed, and to which the respondents had objected in their answer to the appellants' petition of appeal. The statute concerning this court, (1 *N. R. L.* 132. sect. 9. 2 *Rev. Stat.* 166.) declares, *that all appeals from the Court of Chancery, except those from *final* decrees, and all appeals from the Court of Probates, shall be made within *fifteen days* after making the sentence, judgment, decree or order appealed from; and that appeals from *final* decrees shall be made within *five years*, &c. The question is, What is a *final* decree in a cause, within the meaning of the statute? There can be but one *final* decree, and is not that the *last* decree made in the cause? If the principle on which the appellants proceed is to prevail, then every *interlocutory order* made in a cause may be appealed from, within five years after the final or last decree is pronounced, although the statute has limited appeals from interlocutory orders to fifteen days. Great inconvenience and delay must result from such a construction of the statute. A decree to account, for example, is an *interlocutory*, not a final decree. (2 *Mad. Ch.* 347. 2 *Atk.* 385.) If the manner in which the account is directed to be taken be improper, or erroneous, this court cannot correct it. According to the rule of the English chancery, there must be a final decree on the *report* to make it equal to a judgment. (2 *Mad. Ch.* 355, 356. 10 *Vesey*, 39—41. *Travis v. Waters*, 10 *Johns. Rep.* 500—510. 3 *Bro. C. C.* 643. n. 5 *Bro. P. C.* 395.) In the present case there was an order of reference; a *report* by the *master*; exceptions to that report by both parties, some of which were allowed, and others overruled; a new reference to the master; an *amended report*; an order confirming the report, reserving the equity; and, finally, the cause was heard on the 15th of *June*, 1818, on the equity reserved, and the costs, and a final decree made; and an appeal filed several months thereafter. The order of the 29th of *April*, 1816, was made by consent; an appeal cannot, therefore, be made from

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T. A. Emmet, and C. Baldwin, contra. The decretal order of the 27th of June, 1815, established the rights of the parties, and settled every principle in the cause, except the question of costs. The appellants have acted on that belief, *and the last decree does not affect them, except as to the costs. The order or decree which determines the merits, or principles of the cause, must be the final decree: There may be, in this respect, several final decrees in a cause, as where there are distinct matters submitted to the chancellor, his decree settling each matter is a final decree. A contrary doctrine would abridge the right of appeal. An appeal from a final decree authorizes an examination into all previous interlocutory orders which affect the merits of that decree. In *Le Guen v. Gouverneur and Kemble*, (1 Johns. Cas. 498.) *Radcliff, J.*, says, that "by an appeal from any interlocutory or final decree, all the proceedings in the cause anterior to the decree are necessary to be presented to this court, and proper for its determination. It may frequently become indispensable to reverse, alter, or modify the previous proceedings, in order to make them consistent with the decree to be here pronounced; all antecedent matter is, therefore, necessarily before the court, and subject to its control." (*De Labigarre v. Bush*, 2 Johns. Rep. 490.) In *Travis v. Waters*, the decree made on the master's report was considered the final decree, though the cause was afterwards heard on the question of costs. (1 Harris Ch. Pr. 3 ed. 420. *Gilb. Equ. Rep.* 151. *Select Cases in Ch.* 24. 2 Equ. Abr. 81. 2 Johns. Cas. 438.)

Harison, in reply, observed, that this was a question of great importance as regarded the administration of justice. He traced the history of the right of appeal in *England*, and cited *Smith v. Clay*, (*Ambler*, 645.) and 6 Bro. P. C. 395. This court, in *Travis v. Waters*, (12 Johns. Rep. 508.) settled what was a final decree within the meaning of the statute. A decree is final when it settles the rights of the parties upon the whole merits. An order or decree that does not affect the merits of the controversy between the parties, ought not to be the subject of appeal. If the period of 15 days, limited by the act, is too short, it is for the legislature to enlarge it. The sense of the legislature as to what is a final decree, is evident from the directions given in the sixth section of the act relative to the Court of Chancery. (1 N. R. L. 488. 2 Rev. Stat. 167.) The decree need not be enrolled, but is *to be annexed by the register to the pleadings, and other proceedings in the cause, with the reports and decretal orders made therein, &c.

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SPENCER, Ch. J. The *final* decree in this cause was pronounced the 15th of *June*, 1818. After the decree of *June* 27th, 1815, facts were to be ascertained, and the master made a further report in *January*, 1818, and this was necessary before a final decree could be made. In *Travis v. Waters*, (12 *Johns. Rep.* 500—503.) this court considered a decree as final, which was made when all the material facts in a cause had been ascertained, so as to enable the court to understand and decide upon the merits. An appeal from a final decree opens for consideration all prior or interlocutory orders or decrees any way connected with the merits of the final decree. All these prior orders were open to be reviewed, modified or altered by the chancellor, until he pronounced his final decree in the cause. Accordingly, the decretal order of *June*, 1815, was modified by that of *October*, 1815. The final decree of *June*, 1818, is incorporated with the prior interlocutory decrees; and the observations of Mr. Justice *Radcliff*, in the case of *Le-Guen v. Gouveneur & Kemble*, which have been cited, are correct. There are some interlocutory orders that must be appealed from in fifteen days; such as an order for an *issue*. It is not necessary, and may be improper, to particularize all the cases in which an order is so strictly interlocutory, that it must be appealed from within that time. I see no danger of the abuse, or the mischievous consequences which, it is apprehended, are to flow from this construction of the right of appeal. I am of opinion, therefore, that the objection ought to be overruled.

The rest of the judges concurred, and, by the unanimous opinion of the court, the appellant was allowed to proceed.

The CHANCELLOR then assigned the reasons for his decree, which were the same as those contained in the report of the case, except as to some of the exceptions to the master's report as to matters of mere fact, which he stated. (**Vide S. C.* 1 *Johns. Ch. Rep.* 65. 77. 450. 459. 2 *Johns. Ch. Rep.* 543. 3 *Johns. Ch. Rep.* 77. 120.)

The cause was argued by *T. A. Emmet* and *C. Baldwin*, for the appellants, and by *Harison* and *S. Jones, jun.*, for the respondents.

For the appellants, it was contended, 1. That the deed of trust was not actually delivered, and was, therefore, not operative. The fact of non-delivery being proved, there can be no presumptive delivery.

2. That if the management by *Mary Jaques*, or by her authority, of the real and personal estates mentioned in the deed of trust, and the acquiescence of *J. D. J.*, her husband, were deemed sufficient ground to *presume* an effectual delivery of the instrument, such presumption could only be derived from parol testimony of the acts and declarations of the parties to

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the deed, and which would equally support the contemporaneous agreement, in relation to family expenses, and which was equally acted upon by them. The agreement relative to Mrs. Jaques maintaining the family establishment out of her own estate was made previous to the marriage, and the marriage was a sufficient consideration to support it; and it was not only thereby in part executed, but carried into complete effect during the life of Mrs. Jaques. This agreement is not inconsistent with the deed of settlement, the object of which was to secure to her the power of disposing of her own property as she pleased.

3. The settled doctrine of the *English* law is, that where property is thus settled to the separate use of a *feme covert*, she has an unlimited power over it, and may dispose of it, to all intents and purposes, as if she were a *feme sole*, unless restrained by some particular provision in the deed of settlement. Courts do not look to the *letter* only, but to the spirit and intent of the instrument, which is construed in the most liberal manner, as to the relation subsisting between husband and wife.

This court will feel itself bound by a series of decisions in *England*, anterior to 1776; and now, when the question is, for the first time, brought before them, will adopt that rule of law which will place married *women, for their best security, in the hearts and affections of their husbands, rather than under the cold and unfeeling protection of a trustee.

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By the common law, after marriage, the *personal* property of the wife belongs absolutely to the husband, and he, also, becomes entitled to the rents and profits of her real estate. It would have been well if this principle had never been departed from; for why, when a wife has surrendered herself to the arms of her husband, and they are united in their affections, should their *interests* be separated?

The *English* Court of Chancery, deriving much of its principles and practice from the civil law, first opened the way to the rules of that code, in relation to the property of married women. In that justly celebrated code, the property of married women is of two kinds; 1. Her *dowry*, in which the husband enjoys the revenue of the property during the intermarriage, but the ownership and disposal of the capital belongs to the wife; 2. Her *paraphernal* property, the revenues of which are her own, and she may dispose of them, and of the principal itself, without the authority of her husband. (1 *Domat. C. L.* 161. 171. *liv.* 1. *tit.* 9. *s.* 1, 2, 3, 4.) When the Court of Chancery, in *England*, sanctioned and upheld the notion of a separate estate in the wife, and allowed this ante-nuptial contract, the natural inference is, that it adopted the whole of the law, as it stood in that well known code, and in the codes of every state in *Europe* which had adopted that system; that is that the wife should have the entire and absolute control and disposition of her separate estate. It did not intend, when it

restricted the husband from his right, also, to restrain the wife, and put her under disabilities not flowing from the *Roman* law. But as this regulation of property could not be made so as to bind the courts of common law, it was necessary to have recourse to the well known agents of a court of chancery, and have the property vested in *trustees*, as mere instruments of conveyance, thereby avoiding the rules of common law, which do not allow the husband to be the grantee or trustee of his wife. If this was the motive for introducing trustees into these settlements, like trustees to preserve contingent remainders, or for a term of years, to raise *portions for younger children, it is an erroneous notion on which the chancellors of later times, as in *Whistler v. Newman*, (4 *Vesey*, 129.) and *Mores v. Huish* (5 *Vesey*, 692.) have founded their decisions; and which the chancellor, in delivering his opinion in the present case, has adopted from Lord *Loughborough*, (afterwards Earl *Rosslyn*), that *trustees* were created for the protection of the wife, and "to constitute, perhaps, the only sufficient shield against the undue, secret, and powerful influence of the husband." Trustees were introduced merely to avoid the principles of the common law; not to become the counsellors and champions of the wife against the husband. Suppose a wife, by her husband's influence, should choose to forego her settlement, the worst that could happen to her would be, that she would be in that situation in which the common law would have originally placed her, and which is most consistent with the nature of the marriage state, and the true policy of society. Connubial happiness is no where greater than in those countries where the wife relies on the affection of her husband, for protection and support. The idea of a trustee interfering in matters of property to control the impulses of affection or duty, is dangerous to the peace and happiness of families. The civil law, which took away all right from the husband over the paraphernal estate of the wife, approves of the wife putting herself under the conduct of her husband, and of entrusting him, rather than another, with the management of her estate. (1 *Domat*. 171.) The ablest chancellors in *England* have considered the matter in the same light. A court of chancery protects and relieves every person from the effects of fraud, imposition, duress, or undue influence; and where either is proved, it will undoubtedly protect and relieve a wife, who may be more subject to it than persons in other relations of life, and whose interests, therefore, are to be more vigilantly and jealously watched than those of others. But as Lord *Eldon* justly said, in *Parker v. White*, (11 *Vesey*, 209. 222.) that if the husband conducts himself well, he did not know that she could make a more worthy disposition of her interest than to give it to him, though certainly the particular act should be looked to with jealousy. The observation, therefore, of Lord *Loughborough*, in *Whistler v. Newman*, (4 *Vesey*, 144.) that if the rule laid down in *Hulme*

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v. Tenant, (1 Bro. C. C. 16.) *Pybus v. Smith*; (3 Bro. C. C. 340.) and *Ellis v. Atkinson*, (3 Bro. C. C. 347.) and which we contend is the correct one, "is to be pushed to its full extent, a married woman having trustees, and her property under the administration of the Court of Chancery, would be infinitely worse off, and much more unprotected than she would be, if left to her legal rights," is wholly unfounded. In regard to her personal estate, and the income of her real estate, she is in the same situation, and the real estate would, without any protective interference of trustees, be as well secured to her and her heirs, as at common law. The observation of the same chancellor, in *Milnes v. Bush*, (2 Vesey, jun. 488. 498.) that to apply the established doctrine, that a *feme covert* is, as to her separate property, to be regarded as a *feme sole*, as to transactions with her husband, would throw down all the guards which the maxims of the common law, and the prudence and care of the Court of Chancery had established with regard to trust estates in equity, and the influence of husbands, is equally destitute of foundation. Without speaking, at present, of the guards in equity, what are the guards at common law, against the influence of the husband, except her private examination, in passing a fine? In regard to the personal estate of the wife, and the rents of her real estate, the husband has no need of any influence to gain the possession of them. Without a settlement, the wife stands in the same situation as at common law. With a settlement, she is in the situation of a married woman under the civil law. Why, then, should her condition be varied by imposing further restrictions on her power of alienation? It might be said, with Sir John Scott, *arguendo*, in the case of *Whistler v. Newman*, "possibly it may have occurred to the court, from time to time, that such provisions are rather mischievous than useful;" and with Lord Macclesfield, in *Powell v. Hankey*, (2 P. Wms. 82.) that "it was against common right, that the wife should have a separate property from the husband, (they being both, in law, but as one person,) so all reasonable intendments and presumptions were to be admitted against the wife in that case."

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*The same necessity which led to the introduction of trustees, as mere conduits of conveyance, to avoid the embarrassments created by the rules of common law, gave rise to the mode of giving to the wife the *power of appointment*; a power intended for the *enlargement*, not the *restriction*, of her rights. It was adopted when it was not yet perfectly settled how far a court of chancery would go, in supporting a separate property in the wife, beyond what was expressly provided for by the instrument of settlement, and continued, from technical habits, long after the necessity ceased. As these *appointments* were the only means of enabling the wife to exercise her separate ownership, courts of equity, having once adopted, and naturalized the right, disregarded the means, and gave her all the

rights of ownership, whether the means expressed were adequate to that purpose or not, and whether they were pursued or not. In *Hulme v. Tenant*, (1 Bro. C. C. 16.) Lord *Thurlow*, acting on the case of *Norton v. Turvill*, (2 P. Wms. 144.) extended the principle so far, as to consider the execution of a bond by the wife, jointly with the husband, and for his debt, a sufficient *appointment*, as to her separate *personal* estate, and that it would have been so, as to the rents of her real estate, had it not been for a technical legal difficulty, as to an execution against the real estate of the wife, on any judgment recovered on the bond. Though the doctrine of this case is not necessary to the present argument, yet it has been followed and acted upon, from that time until the case of *Socket v. Wray*, (4 Bro. C. C. 483.) decided in 1793, with the exception, perhaps, of the cases of *Blackwood v. Norris*, (*Talbot's Cases*, 43. n.) and of *Caverly v. Dudley*, (3 Atk. 541.) which are noticed by the chancellor in giving his opinion in this case. The case of *Blackwood v. Norris* is only known from a very imperfect note in *Cases temp. Talbot*; and in *Caverly v. Dudley*, it does not appear whether Lady *Dudley* was a *feme covert* or not, and it was a case of a will, not of a marriage settlement. It was not a case in which the rights of husband and wife were brought into discussion. It may, then, be safely affirmed, that there is not a single decision, or a *dictum*, to be found in the books, prior to 1793, that the wife has not the absolute ownership of her separate estate, under a settlement. This assertion is supported by the authority of a very able writer on this subject, (*Clancy's Essay on the Equitable Rights of Married Women, with respect to their separate property*, 89—93, 94—105.) who says, while speaking of the case of *Socket v. Wray*, that it “was decided against the principle of all the authorities on the subject of the wife's separate estate.” He observes further, (p. 93.) that “the principle which Sir *R. Pepper Arden* intended to establish, by his decision in *Socket v. Wray*, was this, that whatever property was limited to a married woman in terms which, if she were sole, would give her the entire interest, and such limitation was accompanied by any restriction as to the mode of disposing of the fund, that such clause, having been introduced with a view to protect her against her husband during the coverture, ought not to be dispensed with.” Without presuming to question the soundness of the principle, he submits, “that it is directly at variance with the doctrine laid down in some prior leading cases on the subject, and that it has not been followed in any subsequent decision.” He then continues his examination of the cases, and says, (p. 105.) “that with the exception of *Socket v. Wray*, they establish, that where there is a trust to the separate use of a married woman, with a power to her to appoint, (that power not being restricted to particular objects, and not depending on a contingency,) either in a *prescribed form*, or

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according to her own directions, there she has the complete property in the subject of the trust, and may exercise over it all the rights of ownership." It is true, however, that either parental affection or solicitude, or pride and selfishness, have sought in the imperfect expressions of *appointments*, or from words having impliedly a restrictive meaning, for the means of controlling that absolute ownership, that necessarily was connected with the original idea of separate property, and to look for other guards against marital influence, than were to be found either in the civil or common law, by laying stress on such words, as the direction to trustees to pay the money into the wife's own hand, or to pay it to her from time to time, or that her receipt alone should be sufficient. These efforts pretty uniformly failed, *and the courts held, either that those expressions had not that meaning, or, if they had, that they were inconsistent with the idea of absolute ownership, and, therefore, to be disregarded. The chancellor, in his opinion, complains of this, and says that "if the technical rule of law, that when a person is owner of property, he takes it with all its accidents, and that every restraint or alienation is repugnant to the ownership, be applied to these settlements, they may as well be abandoned at once, as delusive, for the most guarded proviso against alienation would be void." This is a *petitio principii*. The rule is, that no restraint on alienation by the owner of the property shall be *implied*; but if *expressed and clearly enjoined* in the settlement, it shall prevail, unless contrary to the cardinal rules as to the alienation of property. But how is this a technical legal objection, or a technical rule of law? It is, indeed, to be found in *Coke*, (*Co. Litt.* 223.) and is a *fundamental* rule of law, founded on broad and beneficial principles of public policy. It is no more a *technical* rule of law, than that which declares that estate shall not be tied up in perpetuity. It is a rule of property; and Lord *Northington* has strongly said, in *Wright v. Cadogan*, (*Ambler*, 473. 2 *Eden. Rep.* 257, 258.) there is no rule so certain, so general, and so strongly adhered to by the ablest judges who have sat in chancery, as to observe, *in omnibus*, the rules of law, with respect to the regulation of property. They have been always strictly observed as principles in a court of equity. This very rule was the express ground of the decision of Sir *R. Pepper Arden* himself, in the case of *Bradley v. Peixoto*, (3 *Vesey*, 324.) which he supported by common law cases; and he adverts to his determination in *Socket v. Wray*. Though the earlier chancellors maintained the doctrine here contended for, yet some examples of improper influence on the part of husbands, calculated to excite sympathy for the wife, induced a wish to restrain her power of alienation. Such was the case of *Pybus v. Smith*; (1 *Vesey*, 189. 3 *Bro. C. C.* 340.) there, a trader had eloped with an infant ward of chancery, and Lord *Thurlow* had compelled him to settle it on her, and her issue; and as to her life estate,

to her separate use. The settlement, as usual, was referred to a *master, who studiously inserted the words, "from time to time," &c. In ten days after the execution of the settlement, the husband prevailed on the wife to make a sweeping appointment of her life estate to his banker, as collateral security, and in two years thereafter became bankrupt; and a bill having been filed to enforce this appointment, the case came again before Lord *Thurlow*; the wife seeking to invalidate her act, for the maintenance of herself and family. Here was a very strong case, and Lord *Thurlow* labored to find, if possible, something in the words, "from time to time," to put a restraint on the wife's power of alienation. Subsequent reflection, however, appears to have induced him to abandon this position; and he next fixed on the objection, that she ought not to be allowed to part with her separate property without a judicial examination in court. The same difficulty had once before very strongly occurred to him, in *Ellis v. Atkinson*, (3 Br. C. C. 347. 565. S. C. 2 *Dickens*, 759.) and induced him to retain the case so long under consideration, that the necessities of the parties forced them to a compromise; but he said, as stated by *Dickens*, "that as the 2,000 pounds was in the absolute power of the wife, and no appointment intended for her children, or other purposes, and it was evidently her pleasure to give it to her husband, he did not see how he could prevent her." Next came the case of *Socket v. Wray*, already mentioned. Lord *Loughborough* succeeded Lord *Thurlow*, in 1793, and decided the cases of *Whistler v. Newman*, (4 *Vesey*, 129.) and *Moses v. Huish*, (5 *Vesey*, 692.) It seemed, from these cases, as well as that of *Socket v. Wray*, that a change was about to be effected in the law of that court on the subject of the wife's power over her separate estate. But the influence of these decisions was transitory. Neither Sir *R. P. Arden* nor Lord *Loughborough* had sufficient strength of judicial character to stem the current of authority for a century, nor effect what Lord *Thurlow* did not dare to attempt. As it is, however, on these two cases, that the chancellor, in this cause, has chiefly, if not wholly, rested his decision, it is well to observe how they have been received by the profession. In *Sperling v. Rochfort*, (8 *Vesey*, 164. 178.) Lord *Eldon* says, "Wishing that the law may turn out for *the protection of married women to the extent in which it is represented in *Whistler v. Newman*, I find it impossible to reconcile all that is said in that case, to former cases." Again; in *Parker v. White*, 11 *Vesey*, 209. 223.) he says, "In *Whistler v. Newman*, I considered every point as settled; unless the case could have been decided upon the circumstance that *M.* was improperly dealing for his own interest. If it is asserted, that though Lord *Thurlow*, following his predecessors as far back as the doctrine can be traced, repeatedly decided upon this principle, this court has now a right to refuse to follow it, I am not bold enough to act on

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that position." Again; he says, "Then came the case of *Whistler v. Newman*, upon which it does not become me to make any other remark, than that when this cause comes on to be argued again, it must be considered how far that case is consistent with the preceding authorities; if it is not, then, whether it was competent to the court in that year to refuse to make a decree, consistent with all the declarations of this court for a century." The cause did come on again, (11 *Vesey*, 237.) when the case of *Whistler v. Newman* was not further urged, and Lord *Eldon* decided directly contrary to its principle, saying, "I cannot bring myself, upon any authority that I have seen, and the principle of which I can approve, to affect the disposition of the plaintiff's life estate." In *Dalliac v. Dalbiac*, (16 *Vesey*, 116.) the counsel for the defendant, in commenting on the cases of *Whistler v. Newman*, and *Moses v. Huish*, says, these two cases "are always met by a series of authorities, previous and subsequent, with which they cannot be reconciled. They are now considered as two insulated cases, and receive no attention." Mr. *Sugden*, in his *Treatise on Powers*, (2 ed. p. 111. note,) speaking of the opinion of Lord *Loughborough*, says, "His decision, however, in *Moses v. Huish*, although universally considered by the profession as an unsound judgment, has not been since expressly overruled." Mr. *Atherly*, in his *Treatise of the Law of Marriage, and other Family Settlements*, (p. 335. in note,) speaking, also, of the case of *Moses v. Huish*, observes, "His lordship's opinion, however, is not considered as law, as it stands opposed by several decisions, both anterior and subsequent; *and Mr. *Clancy*, (123.) says, "Now it would appear, that these two decisions (*Whistler v. Newman*, and *Moses v. Huish*) are quite contrary to the course of authorities that were previous to them, and that they have been overruled by the cases of *Wagstaff v. Smith*, (9 *Vesey*, 528.) *Sturges v. Corp*, (13 *Vesey*, 190.) *Essex v. Atkins*, (14 *Vesey*, 542.) and other subsequent cases." Indeed, the chancellor admits that *Essex v. Atkins* clearly overruled the case of *Moses v. Huish*, and Sir *Samuel Romilly*, in his argument of the former case, observed that the latter had been frequently overruled.

In *Fettiplace v. Gorges*, (1 *Vesey*, jun. 46. 48.) Lord *Thurlow* says, "The first case upon the subject is a very old one in *Tothill*," which must have been in the reign of *Elizabeth*. The case of *Blysse v. Sayers*, (4 *Viner. Abr.* 130. *Cases temp. Finch*, 108.) was decided in 1673; the case of *Powell v. Hankey*, (2 *P. Wms.* 84.) was in 1722; *Norton v. Turille*, (2 *P. Wms.*) in 1723; *Ridout v. Lewis*, (1 *Atk.* 269.) in 1728; and *Standford v. Marshall*, (2 *Atk.* 69.) in 1740; and then follow the cases of *Clarke v. Miller*, (2 *Atk.* 379.) *Allen v. Passworth*, (1 *Vesey*, senr. 163.) *Christmas v. Christmas*, (*Select Cases in Chancery*,) (2 *Equ. Cases Abr.* 152.) and the other cases commented on by the chancellor; and to which

may be added, *Hearle v. Greenback*, (1 *Vesey*, sen. 298.) *Fet-
tiplace v. Gorges*, (3 *Bro. C. C.* 3. 1 *Vesey*, jun. 46.) and
Frederick v. Hartwell, (1 *Cox's Rep.* 193.) so that Lord Eldon
was right in saying that this doctrine had existed for more than
a century previous to the decision in *Whistler v. Newman*. In
the case of *Blyse v. Sayers*, (*Finch Rep.* 108.) which is exactly
parallel to the present case, the wife, before her marriage with
her second husband, made an agreement similar to the one in
the present case, reserving all her personal and real estate to
her own disposal; and the intended husband covenanted that
the trustees should enjoy the same, and dispose of them as she,
by writing under hand and seal, in presence of two witnesses,
might appoint; and that she might make a will: and after the
marriage, the husband took a house, and the wife borrowed
money and repaired and furnished it, and before her death, by
deed, directed her trustees to pay her husband *1,000 pounds,
and gave her goods, &c. to her daughter; and the husband
was discharged from paying the money for repairing and fur-
nishing the house, and the same was directed to be paid out
of the wife's own estate. In *Barford v. Street* (16 *Vesey*, 135.)
the property was devised to a trustee, to pay the rents, issues,
interest, and profits, to *Mary Barford*, then unmarried, during
her natural life, to her separate use, and not to be under the
control, &c. of any future husband she might marry, &c., and
from and after her decease, in trust, to convey the estate to
such persons as she, in her life time, whether married or single,
should, from time to time, by any deed or deeds, or writing,
&c., or by her last will, appoint. On her application, by bill,
to the Court of Chancery, it was directed that the property
should be conveyed to her absolutely. The master of the rolls
said, that "an estate for life, with an unqualified power of ap-
pointing the inheritance, comprehends every thing." In *Wright
v. Englefield*, (*Ambler*, 468. 473.) Lord Northington says, "It
has been admitted, that if a woman before marriage retains a
power over her legal estate, to be exercised by way of execu-
tion of the power, she may do it; and though she has not done
it with all the forms, yet the court will supply them in favor
of a person having a meritorious consideration." In *Pybus v.
Smith*, Lord Thurlow had said, that if it was the intention of
the parent to give a provision to a child in such a way that
she cannot alienate it, he saw no objection to its being done;
but such intention must be expressed in clear terms. Following
up this idea, he introduced (but struggling hard, as Lord Eldon
observed in *Jackson v. Hobhouse*, 2 *Merivale's Rep.* 483. 487.
Brandon v. Robinson, 18 *Vesey*, 434. with the prior decisions,
but yielding, at length, to their strength) into a settlement in
which he was a trustee, words of positive restraint, "not to be
paid by anticipation." Mr. Sugden (*on Powers*, 110.) says,
that "upon the first introduction of the words 'by anticipa-
tion,' it was the general opinion of the profession, that they

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were simply void, and that the woman's power of alienation still existed. Equity, in upholding settlements on a married woman for her separate use, considered her, for this purpose, as a *feme sole*, and viewed in that light, she must, like a person *sui juris*, take the property with all its incidents." That doubt shows how strongly a technical rule of law was applicable to cases where a restraint was sought to be implied from the mention of a partial appointment. Mr. Sugden, indeed, urged the same argument, as counsel in the case of *Jackson v. Hobhouse*; but he was told by Lord Eldon, that Lord Alvanley, who followed Lord Thurlow, "thought it a valid clause, and so it had been considered ever since. It was now too late to contend against the validity of a clause in restraint of anticipation." The mode in which they supported that clause, shows how fixed they considered the application of the rule to be to the ordinary provisions of settlements. Lord Eldon observed (18 Vesey, 434.) that Lord Thurlow "did not attempt to take away any power the law gave her as an incident to property, which being a creature of equity, she could not have at law; but, as under the words of the settlement, it would have been hers absolutely, so that she could aliene, Lord Thurlow endeavored to prevent that by imposing upon the trustees the necessity of paying to her, from time to time, and not by anticipation; reasoning thus, that equity, making her the owner of it, and enabling her, as a married woman, to aliene, might limit her power over it." Whether that reasoning be sound or not, it is now decided, and received as law, that a married woman may, by positive and express provisions, or by such as, by clear and necessary implication, show the positive intention, be restrained; but it is equally certain, that where the wife has the absolute dominion over the property, and there are no words of restriction, her power of alienation is absolute; and no restriction can be inferred, or made available, either from the want of expressing a power of appointment, or the mere mention of a particular one. And Mr. Sugden (*on Powers*, 114.) very truly says, that "there is no inconvenience in this doctrine, because express words of restriction are now universally used, where it is intended that the wife shall not have the absolute dominion." In this way, every thing that made Lord Thurlow, Lord Eldon, Lord Loughborough and Lord Alvanley anxious to affect the current of cases, and the two latter to disregard them, has been accomplished: And the *English* system, as to the property of married women, thus completed, is the most beneficial and perfect in the world. A woman who is willing to commit her fortune, with her person, to her husband, from the first moment of their union, may repose on the common law. A woman more cautious, and less confiding, may resort to the doctrines and privileges of the civil law; and those who, from peculiar motives of suspicion, are protected by their own, or by parental solicitude, from every possible

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accident, or excess of conjugal confidence, may have their caprice or their caution gratified, by words of precise and positive restriction. The lines of distinction as to each are exactly drawn, and in these three modes are the rights of married women provided for, and guarded in the best possible way. It is after such a system has been established, in a case exciting no peculiar sympathy, where the wishes of the wife to have the power of alienation were made clearly known by words and acts, that the decree was made which has given rise to this appeal.

But it is said that a wife cannot transact with her husband, but she may, if there are no improper practices on his part. (*Grisley v. Cox*, 1 *Vesey*, *senr.* 518. *Pybus v. Smith*, 3 *Bro. C. C.* 34. *Ellis v. Atkinson*, 1 *Vesey*, *jun.* 189. *Rich v. Cockell*, 9 *Vesey*, 369. *Parker v. White*, 11 *Vesey*, 222.) In *Pawlet v. Delaval*, (2 *Vesey*, *senr.* 663.) there was a *parol* disposition by the wife to the husband, of the capital or principal of her property. Mr. *Clancy*, (p. 166.) after examining the cases, concludes, "that there can be no doubt, at the present day, that a married woman may give her separate estate to her husband, and the gift will be established, if no unfair advantage be taken of her, in the transaction."

The marriage was a consideration, sufficient to support the previous *parol* agreement, that the family establishment was to be supported out of the separate property of the wife. Mrs. *Jaques* has always acted under this agreement, and the appellant is in possession of the property under it. Can it, then, be taken away from him, at the suit of these devisees? She had the absolute ownership; the clause in the agreement restrains her from aliening without her husband's concurrence. This is not to be construed so as to prohibit her *from aliening with his consent. In her lifetime, she gave money to Mrs. *B.*, and to the *Methodist Episcopal church*, without deed. Why, then, might she not give money to her husband without a deed, witnessed by two witnesses? The plaintiff in error is in possession of the property, and the defendants in error seek to obtain it under an equity; and the plaintiff in error may give *parol* evidence to rebut that equity. (*Longfield v. Hodges*, *Loft*, 230. *Rider v. Kidder*, 10 *Vesey*, 360. *Phillips on Ev.* 450.) "A defendant may be admitted to prove, by *parol* evidence, that, after signing a written agreement, the parties made a verbal agreement, varying the former; provided those variations have been acted on, that the original agreement can no longer be enforced without fraud upon the defendant." This principle, though laid down in regard to cases of specific performance, is, also, applicable in the present case. So, where an appointment is imperfectly executed, equity will supply the defect, in favor of a person having a *meritorious* consideration, such as marriage. But Mr. *J.* does not claim the money as a gift; it was expended for the benefit of the wife, and, accord-

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ing to her directions, to supply occasional demands on her, for family expenses, repairs, &c. In the case of a married woman having a separate income, though the husband is equally under a moral obligation to support his family, and fully able to do so, he is not held liable to account, after the death of his wife, for money received by him from the trustees of the wife for her maintenance. (*Brodie v. Barry*, 2 Vesey & Beames, 36. Sir Samuel Romilly, *arguendo*. 3 P. Wms. 355. per Lord Talbot.) Common sense and common equity sanction the doctrine, that the separate property of the wife ought to contribute to her maintenance, or to expenses incurred for her benefit. If a husband is bound to maintain his wife, it is according to his fortune and condition in life, not according to the fortune and rank of his wife.

As to the *Heyl* property, it belonged to the husband, subject to the charge of what was due to the wife on the mortgage. The counsel then entered into an examination of the accounts and the evidence.

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*For the respondents, it was contended, 1. That the deed of settlement was well executed, and was a valid deed. (*Souvery v. Arden*, 1 Johns. Ch. Rep. 240. *Sterry v. Arden*, 1 Johns. Ch. Rep. 261.) But even if the objection as to the delivery was well founded at law, yet the instrument is valid in equity, as an ante-nuptial contract. If necessary, a court of equity would compel an actual delivery of the deed. (1 Johns. Ch. Rep. 75. *Powell v. Hankey*, 2 P. Wms. 343. 2 Freeman's Rep. 205.)

2. As to the legal construction and effect of this deed. It was never the intention of this instrument, that Mrs. J. should dispose of her estate, as she pleased, by parol, without any appointment by deed or will. No more was intended than that she might take the rents and profits. (*Gore v. Knight*, Prec. in Ch. 255. 2 P. Wms. 82.) On any other construction, the deed of settlement would be idle and nugatory. The wife's consent, as to the *rents and profits* received by her husband, is implied, but not as to the *principal*, though received by the husband, and without any disapprobation expressed by the wife. A *feme covert* can dispose of her separate estate in the way only prescribed by the deed of settlement. If there is no settlement, she may dispose of it as she may think proper; but when the mode of disposition is prescribed by deed, her character of a *feme sole*, in regard to her property, is so far qualified, and she must act in the mode prescribed. Why prescribe a mode of executing a power, if that mode is not to be pursued? The wife can exercise no other power over her settled property than is reserved to her by the settlement. She cannot dispose of, or charge her separate estate, even by her consent in court, unless in the mode prescribed by the instrument creating her separate estate. (1 Madd. Ch. 379, 380, 448)

10 *Vesey*, 585, 586.) The form imposed on the execution of the power, is to preserve the person to whom it is given from a hasty and unadvised execution of the power. (*Sugden on Powers*, 203. ch. 5. s. 3. 3 *Cases in Ch.* 66. 107.) The object of Mrs. J. was to prevent her husband from getting possession of her property, through her own weakness and unadvised acts. It is a power reserved to be executed in a particular way. If a person reserves to himself a power to *dispose of property by a deed signed in the presence of five witnesses, and executes a deed in the presence of three witnesses only, the deed is void. The expression of a particular mode of executing a power, excludes every other mode of doing it. It is a restraint on the weakness of the wife; and against whom, in this respect, is she to be protected, but her husband? Against one whose influence is the greater in proportion to their mutual love and attachment. The case of *Fettiplace v. Gorges*, and the other cases cited by the counsel for the appellants, if they have any application, support this doctrine; and it is recognized and repeated by Vice Chancellor *Plumer*, in the case of *Francis v. Wigzell*. (1 *Madd. Ch. Rep.* 258. 261.) "A *feme covert*, having separate property to her own use," he says "may, generally speaking, dispose of it as a *feme sole*; but if the instrument by which she acquires it, prescribes any particular mode in which she must part with it, her disposition of the property must be according to the terms of such instrument." (1 *Madd. Ch.* 377. 388.) The deed or instrument by which Mrs. J., as a *feme covert*, had any power or right, during coverture, over her separate estate, prescribes, in express terms, the mode in which that power is to be exercised. It is admitted, that if negative words were used in the deed of settlement, as to any other mode of disposition, the power of the wife would be limited and restrained. But in principle, negative words can make no difference. Her power, being wholly derived from the instrument, must be governed by it. A contrary doctrine would destroy the whole system of family settlements. There never was a trust deed that did not create a restraint on alienation. The very creation of a trust imposes a restraint. Though the *cestui que trust* has the beneficial interest in the estate, yet both she and the trustee must be regulated by the trust deed. If the doctrine of the appellants is to prevail, there must be an end to all trust estates. In cases of settlement, the shield that was intended to protect the wife, would not only be taken away, but she would be in a worse situation than she would have been had no settlement been made. All the cases on this subject have been so fully examined by the chancellor, that it is unnecessary to repeat them. The principle *to be deduced from them is, that the wife is a *feme sole*, as to her separate property, so far as the deed of settlement makes her so, and no further. The case of *Jackson v. Hobhouse* (2 *Meriv.* 483.) confirms the doctrine for which

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we contend; and the same principle is to be found in *Ewing v. Smith*, decided by the Court of Appeals in *South Carolina*, (3 *Dess. Rep.* 417.)

Again; this deed of settlement is evidently drawn in reference to the statute of *uses*. The power, when executed by deed, in the mode prescribed, passed the real estate; so that the uses shifted by force of the appointment. If the wife undertook to convey her property, in any other way, no use would arise, but would remain in the trustee.

Again; where a wife's power of alienation is not restrained by a deed of settlement, she may dispose of it as she pleases, in regard to *third* persons; but she cannot do so in regard to her husband. (1 *Mad. Ch.* 377. 2 *Vesey, jun.* 498. 4 *Vesey*, 15. 16 *Vesey*, 116. 123.) It is on the same principle, that the law is jealous of all dealings between a trustee and a *cestui que trust*. The transfer set up in the present case, is a mere *parol* disposition by the wife. But where is the witness of such a *parol* gift? No one pretends to have been present at such donation. The witnesses merely depose to certain subsequent declarations of the wife. Such evidence as has been adduced in support of this pretended gift was never allowed to be of any weight in a court of justice. In a court of law it would not be tolerated for a moment, that a trust estate could be so transferred; and the rules of evidence are the same in a court of equity as in a court of law. There is no pretence of fraud in this case, to bring it within the rule cited from *Phillips*, (p. 452.) as laid down in *Pember v. Mathers*; (1 *Bro. C. C.* 51.) and even that case has been doubted. (*Phillips's Ev.* 453. 14 *Vesey*, 524. 7 *Vesey, jun.* 211. 6 *Vesey*, 338.)

As to the pretended agreement before marriage, that the family establishment was to be supported out of the wife's separate estate, there is no evidence but of mere *parol* declarations; and whether made before or after marriage, does not satisfactorily appear. Why was not so important a matter inserted in the deed of settlement? The *evidence, at most, amounts to no more than a declaration of intention. The law imposes on the husband the obligation of maintaining his wife, out of his own property, notwithstanding she has a separate estate secured to her. The cases of *Brodie v. Barry*, and *Fowler v. Fowler*, (3 *P. Wms.* 353.) are exceptions to this general rule, depending on peculiar circumstances.

As to *Heyl's* mortgage, Mr. *J.* purchased in three prior incumbrances, but with the separate money of his wife: the evidence fully contradicts his answer, that he made the purchase with his own money. He is, therefore, a trustee for his wife.

SPENCER, Ch. J. The validity of the deed of settlement has been denied, on the ground that it was never delivered to Mr. *Cruger*, the trustee. There is no positive evidence that a formal delivery took place. The possession of the deed by Mrs.

Jaques is not inconsistent with a delivery to *Cruger*; for the possession of the deed by the *cestui que trust* was, in a legal view, the possession of the trustee. The deed of the 12th of *September*, 1812, executed by *John D. Jaques* and his wife, professedly in virtue of the deed of settlement, and in execution of the power contained in it, and the will of Mrs. *Jaques*, which professed, also, to be made under the power reserved by that deed, the appointment of her husband as one of her executors, and his qualifying and acting as such executor, are decisive proofs, as regards him, that the settlement deed was well executed; and after such repeated and solemn acts of recognition, he cannot be heard to say the deed of settlement was not delivered.

It appears that Mrs. *Jaques* was the owner of a considerable real and personal estate; and it does not admit of a doubt, that her object, in making the deed of settlement, was to guard against the legal effects of a marriage, which, by operation of law, would divest her absolutely of her personal estate, and take from her, during the coverture, all control over her real estate. Her motives could not be to guard against herself, but to retain dominion over her estate, and to prevent her intended husband from intermeddling with her estate, any further than she was pleased to allow.

The deed of settlement is upon the trust, that the trustee should permit her to hold, enjoy, and let the premises conveyed, and receive and take the rents and profits, and that her receipts should alone be sufficient discharges; so that the same should not be subject to the debts, control, or intermeddling of her intended husband, but should be to the only use, benefit and disposal of her, during her natural life, and then to the use of those to whom she should grant or devise the same, by her last will and testament, lawfully executed. The question is, whether Mrs. *Jaques*, with respect to her estate, is not to be regarded in a court of equity as a *feme sole*, and may not dispose of it as she pleases, without regard to her trustee; there being nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition of the estate by her.

I have examined this case with the unfeigned respect which I always feel for the learned chancellor, who has denied the right of Mrs. *Jaques* to dispose of her estate, without the consent or concurrence of her trustee; and I am compelled to dissent from his opinion and conclusions. From the year 1740, until 1793, (with the single exception of the opinion of Lord *Bathurst* in *Hulme v. Tenant*, which occurred in 1778, and in which case a rehearing was granted by Lord *Thurlow*, and the opinion reversed,) there is an unbroken current of decisions, that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of

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her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate. There are nearly twenty cases decided by Lord *Hardwicke* and Lord *Thurlow*, containing the principle I have stated, and which I shall not weary the patience of the court by citing. The case of *Socket* v. *Wray*, (4 Br. Ch. C. 483.) before Sir R. P. Arden, (Master of the Rolls,) in 1793, was the first case to break the continuity of decisions. This formed a precedent for the case of *Hyde v. Price*; (3 Vesey, jun. 437.) then *followed the cases of *Whistler v. Newman*, (4 Vesey, jun. 129.) and *Mores v. Huish*, (5 Vesey, jun. 692) decided by Lord *Loughborough*. In *Whistler v. Newman*, Lord *Loughborough* admitted, that the cases had gone the length, and that he was bound by them, that if a married woman has separate property, she may dispose of it, and the trustees were bound to follow her disposition. In *Mores v. Huish*, his lordship distinguished it from the preceding cases. These cases are succeeded by many others, after Lord *Eldon* became chancellor, in which he restored the law to its first and ancient principle. In the case of *Parkes v. White*, (11 Vesey, jun. 209.) he reviewed all the cases, and strongly intimated, that the decision in *Whistler v. Newman* was in opposition to all the authorities for a century. He laid down the rule to be, that a married woman, having an estate to her separate use, is capable of disposing of it, provided the transaction is free from fraud, and no unfair advantage is taken of her.

The mistake into which I think the chancellor has fallen, consists in considering Mrs. *Jaques* restrained from disposing of her estate in any other way than that mentioned in the deed of settlement. The cases, in my apprehension, are clearly opposed to this distinction; and I am entirely satisfied, that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, when there is no fraud or unfair advantage taken of her, a court of equity will apply it to the satisfaction of such an engagement. This was the principle adopted by Lord *Hardwicke*, in *Grizby v. Cox*, (1 Vesey, senr. 517.) and the same doctrine prevailed in *Pybus v. Smith*, *Ellis v. Atkinson*, and in *Newman v. Cartony*, (3 Br. Ch. C. 340. 346.) In *Pybus v. Smith*, Lord *Thurlow* observed, if a *feme covert* sees what she is about, the court allowed of the alienation of her separate property. The same principle was adopted in *Fettiplace v. Gorges*, (3 Br. Ch. C. 8. 1 Vesey, jun. 46.) and in *Wagstaff v. Smith*, (9 Vesey, jun. 520.) It seems to me, that the power reserved to Mrs. *Jaques*, by the deed, has been misconceived; I understand it, that during her life, her estate is to be at *her absolute disposal, with a further power to grant and devise it by her last will and testament; but if the power of disposition was specifically pointed out, it would not preclude the adoption of any other mode of disposition, unless there were

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negative words restraining the exercise of the power, but in the very mode pointed out. IN ERROR.

Chancellor *Dessaussure*, in 3 *Equity Reports* of cases determined in *South Carolina*, p. 427., has, with great ability, examined all the cases upon this subject, and arrived at the conclusion I have formed. It is true, that his opinion, and that of Chancellor *Thompson*, who concurred with him, were overruled by the three other chancellors; but it was upon the express ground, that the question was *res nova* in that state, and that they were not bound by decisions in *England* in consequence of a colonial statute of 1721. And those who differed in opinion from chancellor *Dessaussure*, admit that his opinion was in conformity with the *English* decisions.

This is the first case in which the power of a married woman having separate property, to dispose of it at her will and pleasure, when not expressly restrained in the mode of exercising that will, has arisen in our courts. I confess that my partialities in favor of marriage settlements are not so strong, as to induce any desire to see the law altered. Generally speaking, the rules of the common law, which give to the husband all the wife's personal property, and the rents and profits of her real estate during coverture, are better calculated, in my judgment, to secure domestic tranquillity and happiness, than settlements securing to the wife a property separate from and independent of the control of the husband. An improvident and dissipated husband may squander his wife's property, and reduce both of them to penury and distress. On the other hand, the possession by the wife of property, independent of and beyond the control of the husband, would be likely to produce perpetual feuds and contention. Marriage is a union of persons and interests, *pro bono et malo*, and the ancient provisions of the common law show forth, in our own country, decisive proofs of its benign and salutary influence. I have, all along, intended to be understood, that the disposition by the wife must *be free, neither the result of flattery, nor of force, or harsh and cruel treatment; and in the present case there is no evidence, that *Jaques* treated his wife with unkindness, or employed any censurable means to induce her to bestow her bounty on him; on the contrary, the evidence is that he uniformly treated her with kindness and affection.

It necessarily results from the power which I suppose Mrs. *Jaques* to have had over her property, that she might give it away, without any formal act, in the same manner as though she had been sole; and her agreement that the family expenses were to be borne out of her estate, especially when executed by her, was a valid act. She was well situated as regards property, while her husband was in quite moderate circumstances. She chose, after the marriage, to maintain her former equipage, and the husband acquiesced in her wishes. It would be extremely hard and unjust, to throw upon him the charge of her

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establishment, when it is clear that she meant to defray the expense of it herself. My opinion, accordingly, is, that the agreement is valid, and that the husband is not only not to be charged with any sums of money expended for the maintenance of the family, but that he is to be allowed for all advances for that object; and also for moneys advanced for necessary reparations to her estate.

The chief justice then examined the other points in the case; but as no legal principle was involved in the discussion of them, it is unnecessary to state the remainder of his observations.

PLATT, J. The facts in this cause are so multifarious and complicated, and the field opened for legal research is so extensive, that I approach the investigation with great embarrassment and diffidence.

As to the first question, I concur in the opinion of his honor the chancellor, that the deed of marriage-settlement must be deemed valid and binding; and having come to that conclusion, for the reasons assigned by him, it is unnecessary here to repeat them.

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*The important question presented in this cause is, as to the *construction* and *effect* of the marriage-settlement. On this point, after much labor and reflection, I am compelled, notwithstanding my unfeigned and habitual deference for his great learning and distinguished talents, to *dissent* from the opinion of his honor the chancellor. He admits the rule, "that a married woman is considered in equity, with respect to her separate property, as a *feme sole*; and is held to have an absolute dominion or power of disposition over it, unless her power of disposition be restrained by the deed or will under which she became entitled to it." And as to the rule of construction, he also admits, that "the weight of book-authority, and especially of the writers who have treated on this branch of the law, is against his conclusion;" and that "they seem to hold, that there must be an *express restriction* upon alienation, either absolutely, or in some other mode than the one mentioned, or the wife will not be bound." The *chancellor* says, "Such strong aversion to the wife's independent enjoyment of her separate estate, manifested so early in the history of the cases, may have given a permanent tone and color to the doctrine of the court." With great respect, I ask, in reply, May it not rather be said, that the "tone and color" of the *modern* decisions are accommodated to the excessive refinements of society, and the artificial innovations, in regard to the rights and duties of good old *English* matrimony? In the language of Sir *Wm. Blackstone*, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the mar-

riage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover she performs every thing." I confess, that I love and venerate the primeval notion of that mystical and hallowed union of husband and wife: when "they twain became one flesh;" when they "forsook father and mother, and clave to each other" with unreserved confidence. Marriage, in that old fashioned sense, is the purest source of domestic joys, and the firm foundation of social order.

*I bow to the rule, as I find it established: but I lament the complicated and artificial anomalies in the relations of domestic life, which have grown, and are still growing, out of the practice of marriage-settlements. They give to the wife the amphibious character of a *feme covert* and a *feme sole*. I view it as an adulteration of that holy union: as a divorce, *pro tanto*, of the marriage contract. A wife, in the "*independent enjoyment of her separate estate*," armed with distrust of her husband, and shutting out his affections and confidence, by refusing to give her own in mutual exchange, is an object of compassion and disgust. Legal chastity cannot be denied to her: but there is danger, that the sacred institution of marriage may degenerate into mere form. It is sometimes, in practice, little more than legalized prostitution; and the parties seem to have no higher objects than sexual intercourse, and the sanction of legitimacy for their offspring. If, in the rapid progress of refinement in civilization, it shall be thought expedient to go one step further, and to allow the wife, by ante-nuptial contract, to stipulate for an exemption from personal control over her by the husband, then the *quasi* divorce would be extended one degree further, so as to confer on her the independent enjoyment of the rights and privileges of a kept mistress. But she would have little claim, indeed, to the endearing appellation and character of a wife.

The new rule, introduced by Sir *R. P. Arden* and Lord *Loughborough*, and which has been adopted by his honor the chancellor in this case, will, I think, tend to sever, in some degree, the marriage union; because it not only renders the wife independent of her husband, as to her fortune, but bars him from a participation of it, by new and increased impediments; as if he were presumed to be her worst enemy. Now, if matrimony is not safe and desirable, without these trammels, and fences, and reservations, and restrictions, I say, marry not at all! The ancient rule was adapted to the state of *English* manners in the days of Lord *Macclesfield*, and accords best with the general simplicity of society among us at this day. I know that particular cases often occur, when such restraints would be salutary; *but, as a general rule, their operation would be unfavorable to connubial happiness. The same benign policy, which forbids divorces *a vinculo*, also forbids the extension of a rule, which impairs the union, and lessens the

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attributes of holy matrimony. It is better that confidence between husband and wife should sometimes be abused, than that it should not exist in that relation. We often see acts of tyranny and cruelty exercised by the husband towards the person of the wife, of which the law takes no cognizance; and yet no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife. It is the price which female wants and weakness must pay for their supply and protection. That a woman should contemplate her intended husband as likely to become her enemy and despoiler, and should guard herself against him as a swindler and a robber, and then admit him to her embraces, presents a sombre and disgusting picture of matrimony. Marriage justly implies a union of hearts and of interests; and the modification of that relation, which excessive refinements have introduced, is a *fungous excrescence* which this court cannot lop off; but we can and ought to prevent its growth.

Of the same character was the new doctrine of Lord *Mansfield*, and his associates, in the case of *Corbett v. Poelnitz*, (1 T. R. 5.) in which it was decided, that if husband and wife choose to separate, and the husband allows the wife a separate maintenance, *she may contract and be sued*, as though she were unmarried, and may be held to bail and imprisoned on a *ca. sa.* without her husband. That innovation was made on the ground that "as the times alter, new customs and new manners arise, which require new exceptions, and a different application of the general rule. But it was soon discovered that, instead of waiting to *follow*, the Court of K. B., on that occasion, *outran* the customs and manners of altered times; and in *Marshall v. Rutton*, (8 T. R. 545.) and *Wardell v. Gooch*, (7 East. 532.) Lord *Kenyon* and Lord *Ellenborough* restored the ancient rule.

I would not be understood as censuring, indiscriminately, the precaution of placing the property of the wife in the hands of trustees, to shield it from the previous creditors of *the husband. It is undoubtedly often just and commendable for parents to make family settlements, so that daughters may be protected from the effects of prodigality, want, and oppression. But all this may be consistent with the idea of a community of interest between husband and wife; so far, at least, that she may permit him to participate in the enjoyment of whatever is her own. It must, however, be admitted that, by our law, a woman *may*, by marriage settlement, so transfer her estate, as to divest herself *irrevocably* of all right of future control or disposition of it. So, also, she may limit and restrict herself, as to the precise mode of disposing of her separate property. But this is against common marital rights; it is generally unfavorable to conjugal happiness, and is inconsistent with public policy. I, therefore, incline to the rule of equity as administered by Lord *Macclesfield*, Lord *Talbot*, Lord *Hardwicke*,

Lord *Thurlow*, and Sir *William Grant*; and as it was very ably, though unsuccessfully, vindicated by the learned and venerable Chancellor *Dessaussure*, in the case of *Ewing v. Smith* (3 *Equ. Rep. S. Carolina*, 447.) which rule I understand to be substantially this: that a *feme covert*, having a separate estate, is to be regarded as a *feme sole*, as to her right of contracting for and disposing of it. The *jus disponendi* is incident to her separate property, and follows, of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over her; and her disposition of it will be sanctioned and enforced by a court of equity, without the assent of her trustee, unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any *particular mode* of exercising her disposing power, does not deprive her of any *other mode* of using that right, not expressly, or by necessary construction, *negatived* in the devise or deed of settlement. (*Powell v. Hankey*, 2 *Peere Wms.* 82. *Squire v. Dean*, 4 *Bro.* 326. *Smith v. Camelford*, 2 *Ves. jun.* 698. *Brodie v. Barry*, 2 *Vesey and Beame*, 36. *Dalbiac v. Dalbiac*, 16 *Vesey*, 126. *Peacock v. Monk*, 2 *Vesey*, 190. *Norton v. Turvill*, 2 *P. Wms.* 144. *Ridout v. Lewis*, 1 *Atk.* 269. *Stanford v. Marshall*, 2 *Atk.* 69. *Allen v. Papworth*, *1 *Ves.* 163. *Penne v. Peacock*, *Cas. temp. Talb.* 41. *Grigby v. Cox*, 1 *Ves.* 517. *Pawlet v. Delaval*, 2 *Ves.* 663. *Newman v. Cartony*, 3 *Bro.* 347. *Hulme v. Tenant*, 1 *Bro.* 16. *Pybus v. Smith*, 3 *Bro.* 340. *Heatly v. Thomas*, 15 *Ves.* 596. *Fettiplace v. Gorges*, 3 *Bro.* 8.)

The ante-nuptial agreement qualifies the marriage contract, so that the wife retains all the rights which she could have exercised over the property as a *feme sole*; except so far as she has, in express terms, incapacitated herself by that instrument. The trustee is the mere depositary of her title and estate, in order that her husband may not come to the possession or enjoyment of it without her consent; and that it may not be liable to the claims of his creditors, unless she chooses so to apply it.

I admit that she may give larger powers to her trustee, so as to lock up the estate, or restrain her own disposing power over it, if the deed *necessarily imports* such intention. But, as was said by Lord *Macclesfield*, in *Powell v. Hankey*, (2 *P. Wms.* 82.) "it is against common right, that the wife should have a separate property, (the husband and wife being in law but one person,) so all reasonable intendments and presumptions are to be admitted against the wife." In that case, the marriage settlement bore a strong resemblance to the one now before us; and after the marriage, the wife permitted her husband to receive the interest of all her securities, without any complaint to the debtors who paid the moneys, or to her trustee; and the lord chancellor, therefore, "intended that the husband received the interest by her consent, as a gift from

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her; and that the husband, acting on that presumption, might have lived in a more plentiful manner; the comfort whereof the wife must have shared in." An account against the husband's executors for those moneys was, therefore, refused.

In *Peacock v. Monk*, (2 *Vesey*, 290.) Lord *Hardwicke* said, "Where there is an agreement between husband and wife before marriage, that the wife shall have personal property to her separate use, she may dispose of it by an act in her life, or will: she may do it by either, though nothing is said of the manner of disposing of it." So, in the case of *Grigby v. Cox*, (1 *Vesey*, 517.) Lord *Hardwicke* stated *the rule to be, "that where any thing is settled to the wife's separate use, she is considered as a *feme sole*, and may appoint in what manner she pleases; and that her trustees need not join, unless made necessary by the instrument;" and that "the wife might make an appointment in favor of her husband, if fairly procured, without improper influence."

In *Hulme v. Tenant*, (1 *Bro.* 16.) and in *Pybus v. Smith*, (3 *Bro.* 340.) Lord *Thurlow* followed the same old rule, yielding, though with reluctance, to the uniform current of authorities. In *Heatly v. Thomas*, (15 *Vesey*, 595.) Sir *Wm. Grant* adhered to the ancient rule. But in *Socket v. Wray*, (4 *Bro.* 333.) and in *Hyde v. Price*, (3 *Vesey*, 437.) Sir *R. P. Arden* resisted the hitherto unbroken current of decisions; and in *Milnes v. Bush*, (2 *Vesey*, jun. 488.) *Whistler v. Newman*, (4 *Vesey*, 129.) and *Mores v. Huish*, 5 *Vesey*, 692.) Lord *Loughborough* followed in this new tract. In *Sperling v. Rochfort*, (8 *Vesey*, 164.) *Rich v. Cockell*, (9 *Vesey*, 369.) and *Jones v. Harris*, (9 *Vesey*, 497.) Lord *Eldon* vibrates, and falters, and doubts, till, in the last case, he comes to the hesitating avowal, that it was "an open question, and one doubtful, and deserving of a very full review, whether the separate property of a *feme covert* might be charged in a different form from that prescribed by the instrument." In the subsequent case of *Parkes v. White*, (11 *Vesey*, 209.) Lord *Eldon* said his mind was in great distraction on this subject; but he admitted that Lord *Thurlow*, "in his decisions on this principle, had followed his predecessors, as far back as the doctrine can be traced;" and he concluded, by saying, "If it be asserted that this court has now a right to refuse to follow it, *I am not bold enough to act upon that position.*"

The ante-nuptial agreement, or deed of settlement in this case, recites that the intended husband "has agreed not to intermeddle with, or have any right, title or interest, either in law or equity, to any part of the rents, issues, profits or proceeds of her property, real and personal; but it is to continue, remain, and be to her, or to such uses as are in this deed of settlement expressed." The deed then conveys all her estate, real and personal, to *Henry Cruger*, "in trust for her; and upon her marriage, to the use of such *persons and uses, and

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subject to such provisions as she, with the concurrence of her husband, should by deed, or by will, without his consent, give, limit, direct and appoint. In default of such directions, &c. then in trust, to permit her to hold and enjoy the same, and receive and take the rents, issues and profits; and that her receipts shall alone be sufficient discharges from time to time; to the end, that the same shall not be subject to the control, debts, intermeddlings or engagements of her husband, but shall be to her only use, benefit and disposal." Considering it as a question of construction and intention merely independent of the adjudged cases, I am of opinion, that the fair and natural import of the deed is, that she intended so to modify the marriage contract, as to retain the entire right of property in all her estate, real and personal, through the intervention of her trustee; and that she should, also, retain the sole, entire, and exclusive right of using and disposing of it, as if she were to remain a *feme sole*.

We must set out in the argument, with the consideration, that she alone was absolute owner of all the property, and had a perfect right to dispose of it as she pleased. And the question then is, How far, if at all, did she divest herself of the estate, or of her disposing power over it, by the deed of settlement? In my judgment, it would require plain and express words to authorize the conclusion, that she meant to lock up her property, or to tie her own hands in the use of it, or to restrict herself in the mode of disposing of it. The specification that she might dispose of it *by deed*, or *by will*, affords no necessary implication, that she might not do it in any other mode common to every proprietor. The specification, '*by deed*,' was probably made with a view to her *real estate only*, and may be deemed to have been inserted at the instance of the husband; because it contains, perhaps, an implied stipulation, that she should not execute a deed without "*his concurrence*." And the specification, "*by will*," was inserted to remove all doubt as to her right to dispose of her property in that mode, "*without her husband's consent*." If the terms of the instrument imposed any restriction on her disposing power it was in favor of her husband, merely, to wit, that she should do it *by deed*, with **the concurrence of her husband*; but if it be considered as a stipulation in his favor only, then it follows, that he may waive it, at his pleasure; which he has done.

That she meant no more than to deprive her husband of his marital rights, in regard to her property, I think is evident from the very appropriate words in which she has expressly declared her intention; to wit, "*to the end*, that the same (her property) should not be subject to the control, debts, intermeddlings, or engagements of her husband; but should be to her only use, benefit, and disposal." She was a widow, without children, and at a time of life which forbade the prospect of her having any; living in a fashionable style, with a handsome

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fortune, and knowing that her intended husband had little or no property ; and it would, indeed, have been very extraordinary, if she had designed to limit herself in the use and enjoyment, or in the mode of disposing of her own property ; and, least of all, ought we to presume, that she meant to restrict herself, as to the measure or the manner of her bounty, towards the man who was to become the partner of her joys and her sorrows. In plain truth, she meant that he should be put upon his good behavior ; and that her liberality and confidence should be regulated by his merits as a husband.

My conclusion, therefore, is, that the *jus disponendi*, retained by Mrs. Jaques over her separate estate, by virtue of the deed of settlement, was absolute and entire ; and that she had a right, and was competent, not only to dispose of that property for her own use and pleasure, but to supply the wants of her husband from that fund, and to give him such parts of it as she chose, in the same manner as she might have done, if he had not been her husband. With this difference only, that, as between husband and wife, courts will scrutinize the transaction with a jealous eye, in order to protect the wife against undue influence. And here, with great deference to his honor the chancellor, and to Sir R. P. Arden, Lord Loughborough, and Lord Eldon, I cannot forbear to remark, that they appear to lay more stress on the mode of appointment by the wife, than a due regard to her security demands. It is difficult for me to perceive why the undue influence of the husband may not be as easily *and as successfully exerted, by inducing the wife to sign a deed, as in procuring parol gifts or appropriations by her. For it must be remembered, that such a deed of appointment by a *feme covert* of her separate estate, requires no judicial examination as to her freedom of will.

From the evidence as to the life and conduct of the appellant, John D. Jaques, in the character of a husband, I think it due to him to say, that he sustained that character in a creditable manner. His conduct towards his wife appears to have been kind and faithful ; and, in the charge and management of her property, so far as it naturally devolved upon him as her agent, he conducted her affairs with prudence and discretion. His neighbors and domestics have been called to disclose his most unguarded words and actions, in relation to his wife and her property ; and few men, indeed, could bear such an inquisition as he has been subjected to, with less disparagement. From the charge of prodigality, he stands perfectly acquitted ; the allegation of embezzlement is not proved, and I see not the slightest evidence of coercion, restraint, or undue influence by him over the disposing power of his wife. The case shows, that she lived after the marriage as she had been accustomed to do before, in a style corresponding to her fortune ; that little more than the income of her estate was exhausted, by all her expenses and liberality. She died without issue, and devised

one third of her estate to her husband, one third to distant relatives, and one third to her church. This final distribution of her bounty, while it evinces her gratitude and affection for her husband, also shows the independent exercise of her disposing power. The important fact, that she retained the settlement deed in her own possession, without ever complaining to her trustee, or claiming any protection from him under it, although he constantly resided in her neighborhood, is strong evidence of the propriety of her husband's conduct, and of her assent to his acts in relation to her property. She seems to have treated the deed of settlement as a weapon or a shield, which she kept in reserve, but which, happily, she never found occasion to use.

*I am, accordingly, of opinion, that there is no just distinction between the *income* of her estate, or the *interest* on her securities, and the estate or principal from which that income and interest arose, in regard to her power of disposal. Being mistress of her own fortune, she had as perfect a right to give it to her husband, or to the church, by a voluntary act in her lifetime, as to do it by her will. As to the mode, she was subject to the general law for transferring property.

In regard to that part of the decree which relates to the lots of ground bound by the mortgage and judgment which the wife held against *Christian M. Heyl*, the answer of the appellant avers, that those securities were placed in his hands by his wife, with full knowledge of the prior encumbrances which had been purchased up by him; that she desired him to do the best he could, and to apply the proceeds, both principal and interest, towards family expenses, and the repairs of her estate; that, accordingly, upon the foreclosure and sale, he purchased in the mortgaged premises, and took a deed to himself, discounting the price from the sum due on the securities; and that he advanced his own money to an equal amount, in lieu thereof, toward the support of the family, pursuant to his wife's directions.

Robert Jaques, a witness for the appellant, *John D. Jaques*, confirms that allegation; and he further testifies, that during the last illness of Mrs. *Jaques*, he was requested by her to draw a deed of trust, disposing of her real estate, "on which occasion she told him, that the *Heyl* property, meaning the lots covered by the mortgage and judgment aforesaid, and which had been bought in by *John D. Jaques* under the foreclosure, and under the arrangement made on that occasion, belonged to her husband, into whose hands she had put all her claims against said *Heyl*; and that the proceeds thereof had been expended by him in support of her family, and in expenses relating to her property; and that she had nothing to do with the aforesaid property of said *Heyl*." *Margaret Stuart's* testimony confirms that of *Robert Jaques*, as to all those facts; and these admissions of Mrs. *Jaques*, of the title

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of her husband to those lots, and *that he had accounted to her satisfaction for the price of them, is evidence that she had authorized and ratified his acts, and rebuts the equity now claimed as to those lots.

I think the evidence is insufficient to show, that the renewal of the lease for the lot in *Murray street*, in the name of *John D. Jaques*, was procured by the money of his wife. The fact is denied, and the proof rests on vague surmise. But if it were so, then the acknowledgments of Mrs. *Jaques* are evidence, that he had accounted to her satisfaction. The subsequent sale of that leasehold estate by *John D.* to *Robert Jaques*, therefore, stands unimpeached, and subject to no trust.

There is no doubt of the rule, that a trustee, without the previous consent of his *cestui que trust*, cannot speculate for his own benefit, by purchasing with the trust funds. Such purchases enure to the benefit of the *cestui que trust*. But this means no more than that the *cestui que trust* may, at his election, either *affirm* such speculating purchase, and charge his trustee with the money so expended, or he may insist on holding the land for his own benefit, and credit his trustee for the price paid.

A view of the whole evidence in this case, I think, warrants the conclusion, either that Mrs. *Jaques*, when she placed those securities in the hands of her husband for collection, agreed that he might purchase in the mortgaged lots for his own benefit, accounting to her in family expenses for the price; or that subsequent to the purchase by the husband, as her agent, and with a full knowledge of the transaction, she elected to affirm the sale to her husband, for his own benefit, and thereby waived her claim to the lots as *cestui que trust*. Upon either supposition, the equity now claimed in regard to those lots is rebutted.

If a married woman be permitted under a settlement to act as a *feme sole*, in regard to her property, it is perfectly reasonable that her acts, declarations and confessions, freely made, should be allowed to have the same effect in regard to the rights and interests of others, as if she were in reality a *feme sole*. Here it is proved by two witnesses, that Mrs. *Jaques* delivered the bond and mortgage, &c. to her husband, *and told him to do the best he could with them, and to apply the avails towards the support of the family, and in repairs and improvements of her estate; and that she afterwards pointedly acknowledged that he had foreclosed the mortgage, and had purchased in the lots for himself; and that he had accounted to her for the avails of those securities in a satisfactory manner; that the lots belonged to her husband, and she had no claim to them. Now, suppose they had not been husband and wife, and the same facts had occurred between them, could there be a doubt that she, and all persons claiming under her, would be barred of any claim to those lots?

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Several witnesses swear, that she repeatedly declared that her household establishment, and all her family expenses, were supported and paid out of her estate, according to the mutual understanding between herself and her husband previous to their marriage. And this arrangement, so probable and so reasonable, accords with all her subsequent life and conduct. It is true, that such an agreement was *revocable* at her pleasure ; and if she had insisted upon her strict legal rights, her husband was bound to maintain her, at his own expense, but certainly not in such a style as she chose, and had been accustomed to.

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His honor the chancellor says, "The defendant ought to be precluded by his deed of settlement, from claiming any part of his wife's estate, founded on any parol agreement or gift of the wife, and he sets up no other:" and "to allow the husband to set up contemporary, or subsequent parol agreements, confessions, or gifts, would be allowing him to contradict and defeat the settlement." This was a proper inference and deduction from the rule of equity and principle of construction adopted by the chancellor ; to wit, that "her disposition of the property was to be by deed, in concurrence with her husband, or by will without it ; and that her receipts were to be *alone* sufficient discharges, from time to time, of her title to the rents, issues, and profits." But constrained, as I am, to differ in judgment from his honor the chancellor, in that cardinal principle and *rule of construction, the natural consequences of his position on that point do not stand in my way. If, as I contend, the wife had an unlimited disposing power over her separate estate, with the single qualification that, perhaps, she could not convey her interest in her lands without the concurrence of her husband, then it follows, that there is no repugnance between her "parol agreements, confessions, or gifts," and the deed of settlement ; nor do they "contradict or defeat" that settlement. The appellants claim under her as a *feme sole* ; and all the admissions, parol agreements, and gifts, which she was competent to make, are obligatory upon them. She had power to consent, by parol, that her husband should not only receive her income, but also collect her debts ; and when the moneys were in his hands, she had an equal right to direct, by parol, the application of them to the support of the family ; to the payment of debts due from her ; or she might, in the same manner, give the money to him or to whom she pleased ; and after such application was actually made, those acts were irrevocably binding on her, and all claiming under her. She had as perfect a right to give money to her husband, as to give it "for building a church at *Rahway*." Such gifts were perfected by delivery only ; and her admission that she made such gifts or appropriations, is as valid in the one case as in the other.

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My opinion, therefore, is, that the decree ought to be reversed.

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This being the opinion of a majority of the court, (AUSTIN, NOYES, and SWART, Senators, dissenting,) it was thereupon "ORDERED, ADJUDGED and DECREED that the *decretal order* made by his honor the chancellor, in this cause, on the 27th day of *June*, 1815, be reversed, *so far* as the same declares and decrees that the freehold estate, situate adjoining to *Warren street* in the city of *New-York*, mentioned in the pleadings in this cause, the title to which stands in the name of the said *John D. Jaques*, which title he acquired from a master in chancery, in consequence of a sale thereof under a decretal order of the said Court of *Chancery, founded on a mortgage thereof, given by one *Christian M. Heyl*, in the pleadings for that purpose mentioned; and, also, the leasehold estate situate adjoining *Murray street*, in the city of *New-York*, the title to which stands in the name of the said *Robert Jaques*, and which title was acquired from the said *John D. Jaques*, by assignment, as in the pleadings mentioned, respectively, of right belonged to *Mary*, late wife of the said *John D. Jaques*, at her death; and that the said last-mentioned estates of right belong and are distributable, according to a certain deed in the pleadings mentioned, to the said *Robert Jaques*, on the 22d of *September* 1812, and the last will and testament of the said *Mary*; and that, for the purpose of such distribution of the aforesaid estates respectively among the respondents and the appellant, *John D. Jaques*, according to their respective rights, under the said deed, to the said *Robert Jaques*, of the 12th of *September*, 1812, and the said last will and testament of the said *Mary*, late the wife of the said *John D. Jaques*, the moneys arising from the sale thereof, under and by virtue of the said decretal order, and deposited with the assistant register of the said Court of Chancery, should remain with him, to abide the further order of the said Court of Chancery relating thereto: And *this court* doth declare and *adjudge* that the said moneys of right belong to the said *John D. Jaques*, and do decree and order that the same be forthwith paid to him as his own proper moneys: And it is *further* decreed, declared and adjudged that the said *John D. Jaques* is not, and ought not to be, accountable to the executors of the said *Mary Jaques*, for any part of the debts which were due, by the said *Christian M. Heyl*, to the said *Mary*, as in the pleadings mentioned: And it is *further* ORDERED, ADJUDGED and DECREED that the said decretal order be reversed, *so far* as the same orders and decrees the said *John D. Jaques* to account with the respondents for the rents and profits of the said real estate, adjoining *Warren street*, from the 1st of *March*, 1810, the time when he took a title for the same from a master in chancery, as mentioned in the pleadings in this cause; And *so far* as the same orders and decrees the said **John D. Jaques* and *Robert Jaques* to account, respectively, for the rents and profits of the said leasehold estate situate adjoining *Murray street*, standing in the name of

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the defendant *Robert Jaques*, from the day last-mentioned, according to the time they shall respectively have been in possession or in the receipt of the rents thereof; and *also so far as* the said decretal order orders and decrees that in relation to the said freehold and leasehold estates adjoining *Warren street* and *Murray street*, the said *John D. Jaques* and *Robert Jaques* should be allowed, respectively, for all allowances by them made thereon, which are of a nature to be permanently useful, or increase the value thereof; and *also so far as* the said decretal order decrees and orders that the said *John D. Jaques* shall not have any allowance for expenditures in the maintenance of the said *Mary*, her family or equipage, during the time she was the wife of the said *John D. Jaques*; and *also so far as* the same directs, that in taking the account therein directed of the personal estate of the said *Mary*, the said *John D. Jaques* shall not be charged with sums received as interest or dividends arising from the said *Mary's* personal estate, during her life, unless where the said *John D. Jaques* shall show himself entitled thereto, as hereinafter directed and decreed. But that in taking the said account hereafter to be taken, the said *John D. Jaques* be charged with all the personal estate, as well principal sums as interest moneys and dividends received by him from her personal estate.

And it is further ORDERED, ADJUDGED and DECREED that the decretal order made in this cause, by the said Court of Chancery, on the 5th day of *October*, 1815, be reversed, in all its parts and directions, except so far as the same orders, adjudges and decrees that the said leasehold premises adjoining *Murray street*, in the city of *New-York*, should not be sold as in the first-mentioned decretal order directed, which said so excepted direction is hereby affirmed. And it is further ORDERED, ADJUDGED and DECREED that the said first-mentioned decretal order of the 27th day of *June*, in the year 1815, be varied and modified, so far as that the said *John D. Jaques* may be obliged to account for *the rents and profits of the real estate situate at the corner of *Broadway* and *Reed street*, only according to the value of the same to him, as a personal residence, under the circumstances, that he, and the said *Robert Jaques*, were restrained by an injunction in this cause from letting the same; and that the same must have remained unoccupied, if he had not occupied the same; And that, in taking the account of the personal estate of the said *Mary*, the said *John D. Jaques* shall not be charged with the moneys received by him for the leasehold estate, in *Warren street*, sold under the mortgage of the said *Christian M. Heyl*, and purchased by or for *William Wilmerding*, in the pleadings in this cause mentioned; and the said *John D. Jaques* shall be allowed for all moneys over and above the said debts, which were due from the said *Christian M. Heyl*, to the said *Mary*, and expended by them at the desire of the said *Mary*, or for necessary reparations to any part of her

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estate, or for the support and maintenance of the said *Mary*, her family establishment, or equipage, during the time she was the wife of the said *John D. Jaques*; and also, for all moneys which, from the facts or circumstances connected with the same, it shall appear, and be considered, by the said Court of Chancery, that the said *Mary* intended as a donation from her to him, the said *John D. Jaques*. And it is further ORDERED, ADJUDGED and DECREED that the said decretal order of the 27th day of *June*, 1815, be affirmed, as to all matters not herein and hereby reversed or varied: And it is further ORDERED, ADJUDGED and DECREED that the accounts heretofore taken in this cause be rectified and varied, both as to the principal and interest, conformably to this decree: and that, in all other respects, the same stand confirmed; but that, for so varying and rectifying the said accounts, the parties in this cause shall respectively be at liberty to charge and discharge, as is usual in taking of accounts before a master; and that the master to whom the accounts shall be referred, shall have the powers for that purpose specified and set forth in the said first-mentioned decretal order of the 27th day of *June*, 1815.

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*And it is further ORDERED, ADJUDGED and DECREED that the final decree made by the Court of Chancery, on the 15th day of *June*, 1818, be reversed, and that the question of costs in the said Court of Chancery, and all further directions as to the final decree in this cause, be referred back to the said Court of Chancery. And it is further ORDERED, ADJUDGED and DECREED that this cause be remitted to the Court of Chancery, to the end that the said court may act therein as may be just and proper.

Decree of reversal accordingly. (a)

(a) In this case, (3 *Johns. Ch. Rep.* 77.) the chancellor went into a full examination of the decisions of the *English* chancery, on the question, how far the wife was to be considered as a *feme sole*, in regard to her separate property settled to her separate use; and he concluded that the *English* decisions were so floating and contradictory, as to leave the court here at liberty to adopt the true principles of these settlements, which he stated to be that the wife, as to her separate property, is to be deemed a *feme sole sub modo* only, or to the extent of the power clearly given by the settlement. That her incapacity is general, and the exception was to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of the law, that the intention was to govern, and to be collected from the terms of the instrument; and her power of disposition must be exercised according to the mode prescribed in the deed or will, under which she becomes entitled to the property. That, therefore, when she has a power of appointment *by will*, she cannot appoint *by deed*; nor, when she is empowered to appoint *by deed*, is the giving a *bond*, *note*, or *parol promise*, without reference to the property, or making a *parol gift*, such an appointment; nor, when it is said, in the settlement, that she is to receive from the trustee the income of her property, as it may, from time to time, become due by *anticipation*, dispose at once of the whole income. But the decision of the Court of Errors, in this case, does not confirm these restrictions, further than they are specified, in express and positive terms in the deed of settlement. 1 *Johns. Dig.* 260. See also *Udall v. Kenney* 3 *Cowan's Rep.* 590.

END OF THE CASES IN ERROR.

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THE SEVENTEENTH VOLUME.

A.

ACCORD AND SATISFACTION.

1. Though a promise by words may be discharged by *parol* before it is broken, yet an agreement, on an adequate consideration, to pay a certain sum, cannot be discharged by an agreement to receive a less sum. *Scymour v. Minturn*, 169
2. An agreement without a *seal* cannot operate as a *release*; and if the consideration is merely nominal, it cannot operate as an *accord and satisfaction*. *ib.*

ACTION.

- I. *When a cause of Action accrues.*
- II. *Commencement of Action.*

I. *When a cause of Action accrues.*

The defendant, in consideration of 25 dollars, promised to indemnify the plaintiff, (who had subscribed to pay a certain sum annually to the trustees of a religious society, for the support of a minister,) against any claim arising from his subscription; the plaintiff having been sued for his subscription, and a judgment recovered against him for 5 dollars and 43 cents, brought

an action against the defendant, to recover the damages: *Held*, that the contract of indemnity was broken as soon as the plaintiff was sued on his subscription, and that he might maintain an action against the defendant, without proving an actual payment of the money; as the judgment against him fixed the amount he was to pay, and was the proper measure of the damages which he was entitled to recover of the defendant. *Conkey v. Hopkins*, 113

Vide ASSUMPSIT, II. 8. *DOWER*, 2, 3.

II. *Commencement of Action.*

Vide SHERIFF.

Limitation of Actions, *vide* LIMITATION.

ACTION ON THE CASE.

- I. *Negligence.*
- II. *Nuisance.*

I. *Negligence.*

1. Where the plaintiff, in an action on the case, declares, that the defendant, *contriving, and maliciously intending*, to injure and aggrieve the plaintiff, dug up the soil of a

- contiguous lot, whereby the foundation wall of the plaintiff's house was injured, &c. evidence of *negligence* on the part of the defendant will support the declaration; the allegation of malice being immaterial, as it might be struck out, as surplusage, and there still be left a good cause of action. *Panton v. Holland*, 92
- 2 A person building a house contiguous to, and adjoining the house of another, may lawfully sink the foundation of his house below the foundation of his neighbor's house, and is not liable for any consequential damage, provided he used due care and diligence to prevent any injury to the house of the other. *ib.*
 - 3 No civil action will lie against an *overseer of highways*, at the suit of an individual, for an injury which he has sustained in consequence of the neglect of the *overseer* to keep a *bridge* in repair. *Bartlett v. Crozier*, in error. 439
 - 4 Nor, it *seems*, will such action lie against the *commissioners of highways*, though, if a private action would lie at all, it would be against them. *ib.*
 - 5 The party injured in consequence of a *bridge* being broken, or out of repair, can sue only for the *penalty* imposed by the statute, (sess. 36. ch. 35. 2 *N. R. L.* 270.) for each neglect or breach of duty. *ib.*
 - 6 If, however, a private action would lie at the suit of the person injured by a bridge out of repair, it must be on the statute; and the declaration ought to state specially the cause of action arising under the statute, and every fact requisite to enable the court to judge whether there has been a breach of duty. *ib.*
 - 7 It is not enough to state generally, that the defendant was an overseer of highways, and wilfully neglected his duty, and suffered the bridge to remain out of repair, whereby the plaintiff's horse fell through and broke his leg, &c. *ib.*
 - 8 Such a declaration is not aided by a verdict; for though a title defectively set forth may be cured by a verdict; yet a verdict will not cure a total defect of title. *ib.*

II. Nuisance.

9. Where several owners of mill-seats on a stream of water, have a common and equal right to the use of the water, though no action lies against the owner of the mill above, for the damage which the owner of the mill below may incidentally suffer from the reasonable use of the water by the former, for his own benefit, yet the owner of the mill above has not an unlimited right to use the water as he pleases, or to stop the natural flow of the stream, so as to destroy, or render useless the mills below. *Merrit v. Brinckerhoff and another*, 306
10. And if the owner of the mill above shuts down his gate, and detains the water for an unreasonable time, or lets it out in such unusual quantities as to prevent the owner of the mill below from using it, or deprives him of the reasonable and fair participation in the benefits of the stream, he will be answerable to the party injured, to the extent of the loss thereby sustained. *ib.*

Vide FISHERY, 1.

Action *qui tam*, &c. Vide ERROR, 1, 2

Action of Ejectment. Vide EJECTMENT.

Action for an Escape. Vide SHERIFF.

AFFIDAVIT.

Vide PRACTICE, 1.

AGENT.

The vessel of the plaintiff was employed by the defendant, a captain in the navy of the *United States*, in transporting ordnance and military stores of the *United States*, from *Oswego* to *Sacket's Harbor*, during

the late war ; and, by the direction of the defendant, was sunk in the harbor of *Oswego*, in order to prevent the ordnance, &c. from falling into the hands of the enemy, who captured *Oswego*, and raised and carried off the vessel, &c. *Held*, that the defendant was not answerable to the plaintiff for the value of the vessel so sunk and lost. *Bronson v. Woolsey*, 46

Vide FOREIGN LAWS.

AGREEMENT.

- I. *Performance*.
- II. *Rescinding an Agreement*.

I. *Performance*.

1. Where an executory contract has been entered into, so as to become binding on the parties, both parties have acquired such an interest in its execution, that neither of them can divest the other of his right to have the contract fulfilled. *Skinner v. White and others*, 357
2. And if one of the parties refuses to proceed further, so that the other is disabled from performing his part of the contract, it is a violation of the contract, for which the party may have his action to recover damages against the one who has been the cause of the non-execution of the contract. *ib.*

Vide ACCORD AND SATISFACTION, 1, 2.
CHANCERY. FRAUD, 1, 2.

Agreement, how discharged, *vide* ACCORD AND SATISFACTION.

Illegal agreement, *vide* ASSUMPSIT.

II. *Rescinding an Agreement*.

3. Where a party intends to abandon or rescind a contract, on the ground of a violation of it by the other, he must do so promptly and decidedly, on the first information of such breach. *M'Neven and others v. Livingston and others*, in error, 437

4. If he negotiates with the party, after a knowledge of a breach of the contract, and permits him to proceed in the work, it is a waiver of his right to rescind the contract. *ib.*

AGRICULTURAL SOCIETIES.

Where *agricultural societies* in the counties are to be instituted, in order to entitle themselves to the sums appropriated by the act of the 7th of April, 1819, (sess. 42. ch. 107.) for the promotion of agriculture, &c. they should be formed after due public notice to the inhabitants of the county to meet for that purpose. *Matter of the Agricultural Society of Dutchess*, 87

AMENDMENT

1. The defendant cannot take advantage of a defect in the direction of a *capias ad respondendum* after he has appeared to it, and pleaded ; the defect being amendable. *Bronson v. Earl*, 63
2. A record in which a judgment was entered for the defendant, on a plea of *non est factum*, accompanied with a notice of special matter to be given in evidence at the trial, was amended by striking out the judgment and entering a judgment of nonsuit, so as to accord with the truth of the case. *Lee v. Curtiss*, 86
3. Where the defendant pleads a special plea, to which the plaintiff replies, takes issue, and gives notice of trial at the next circuit, the defendant cannot, though within twenty days after service of the plea, amend it, as of course, under the 8th rule of April term, 1796. *Squires v. Mallory*, 3
4. Where the plaintiff, in an action of *slander*, laid his damages at 1,000 dollars, and the jury found a verdict for the plaintiff, for 4,250 dollars, the court refused to allow the declaration to be amended, by

increasing the amount of damages alleged. *Curtis v. Lawrence*, 111

5. The court may allow amendments in actions on *penal* statutes, as well as in other suits. *Low, q. t. v. Little*, 346
6. But where, in an action of debt *qui tam*, under the statute for preventing usury, the writ which had been sued out in due time, and sent by mail to the sheriff of the county, had been lost or miscarried, and the plaintiff, supposing it to have been served and returned, proceeded to file his declaration, &c. the court refused to allow an *alias capias* to issue, as grounded on a return of *non est inventus* to the former writ, or to allow a *capias* to be issued and filed with a return of *non est inventus* endorsed thereon, *nunc pro tunc*. *ib.*

Amendment of written instruments, *vide* CHANCERY, III. 5.

APPEAL.

An appeal from a final decree in a cause opens, for the consideration of the Court of Errors, all prior interlocutory orders or decrees, in any way connected with the merits of the final decree. *Jaques v. Trustees of the Methodist Episcopal Church*, 548

Appeal from an order of removal. *Vide* POOR, 4.

Appeal from a Justice's Court, *vide* CERTIORARI TO A JUSTICE'S COURT, 2, 3.

Appeal from the order of the trustees of *Newburgh*, *vide* HIGHWAY, 2, 3.

Vide COURT OF ERRORS.

AUDITA QUERELA.

An *audita querela* is a regular suit, in which the parties may plead and take issue, &c. *Brooks v. Hunt*, 434

Vide COURT OF ERRORS, 4.

ARREST.

Where the *front* door of the defendant's house was generally kept fastened; and the usual entrance was through the back door, and the sheriff having entered by the back door while it was open, in the night, broke open the door of an inner room in which the defendant was with his family, and arrested him, the arrest was held lawful. *Hubbard v. Mace*, 127

ARREST OF SHIPS OR VESSELS.

The act (sess. 22. c. 1.) *authorizing the arrest of ships or vessels, for debts contracted by the master, owner, or consignee, for or on account of such ships or vessels, &c.*, and the act (sess. 40. c. 60.) amending the same, extend only to ships or vessels navigating the *ocean*, or at most, such as sail coastwise, from port to port. A ferry-boat, plying across a river, as from *New-York* to the opposite shore of *New-Jersey*, is not liable to attachment under these statutes. *Birkbeck v. Hoboken Horse Ferry-Boats*, 54

ASSIGNMENT.

1. The assignment of a *chose in action* need not be by writing *under seal*: a delivery of it, for a valuable consideration, is sufficient. *Prescott v. Hull*, 284

Vide PLEADING, I. 1.

2. P. being indebted to R., in *February*, 1799, delivered to him the bond of B. as collateral security for the debt. The obligor, in 1802, offered R., as the only means in his power, to pay him the amount of the bond in *land* at a certain price, or at a fair valuation; which offer R. refused to accept, though P. expressed his readiness to accept the offer; and one of his assignees (P. having become a bankrupt) offered to indemnify R. for any loss which might arise, on a fair sale

of the lands, if he would accept the offer: B. became insolvent, so that the debt was lost: *Held*, that R., by his refusal to accept the offer of payment in land so made by B., did not, under the circumstances of the case, render himself liable for the amount of the bond to P. or his assignees. *Rhineland v. Barrow and others*, in error, 538

Vide ASSUMPSIT, II. 7. SET-OFF, 2.

ASSUMPSIT.

I. *What consideration will support an Assumpsit.*

II. *Implied Assumpsit.*

I. *What consideration will support an Assumpsit.*

1. If a consideration be illegal, it will not support an *assumpsit*. *Coven-try v. Barton*, 142
2. As, if one requests or directs another to do an act which he knows, at the time, will be a *trespass*, and promises to indemnify him, the promise is void. *ib.*
3. But if the party who does the act, at the instance or command of another, does not know, at the time, that he is committing a *trespass*, the promise to indemnify is valid. *ib.*
4. As where the plaintiff, being ordered out by the *overseer of highways* to work on a certain road, was ordered by the *overseer*, by direction also of the *commissioner* of highways, to pull down and remove a turnpike-gate and fence, erected at the intersection of the road, on which the parties were working, with a turnpike-road, supposing it to be a *nuisance*, and the plaintiff, accordingly, removed the gate and fence, on the promise of the *overseer* to indemnify him; this was held to be a valid promise, on which the plaintiff might maintain an action to recover of the defendant an indemnity, for what he had been compelled to pay on a judgment

recovered in an action of *trespass* against him, brought by the *Turnpike Company*, whose gate had been so removed. *ib.*

5. No action can be maintained on a promissory note given for the consideration money, on the sale of a *slave* contrary to the statute. *Helm v. Miller*, 296

II. *Implied Assumpsit.*

6. The defendant gave to the plaintiff a written memorandum of items of account, at the bottom of which, he promised to pay to the plaintiff, or order, the amount specified, being for the value in a protested bill, &c., and adding, "the above is to be paid out of my one half of proceeds of provisions and lumber, addressed to Messrs. *H.* and *M.* at *B.*, &c. after deducting your account." *Held*, that, whether the writing amounted to a *promissory note* or not, it was good evidence to support a count on an *insimul computassent*. *Montgomerie v. Ivers*, 34
7. The clause providing for the payment out of proceeds of provisions &c. was a qualified *assignment* of those proceeds, and an authority to *H.* and *M.* to apply them to the discharge of the plaintiff's debt. *ib.*
8. But the plaintiff is not entitled to recover the amount of the defendant personally, without first showing, either that there was no such fund as the one designated, or that it was insufficient to pay the debt, or that he had applied to the holders of the fund, and had not obtained satisfaction out of it. *ib.*

Vide LIMITATION OF ACTIONS.

ATTORNEY.

Whether an attorney is sued by *writ* or by *bill*, he is equally entitled to *personal service* of the declaration, and *notices* of all subsequent proceedings. *Brown v. Childs*, 1

Vide EVIDENCE, VI. 13.

AWARD.

- I. *Arbitrator and Umpire.*
- II. *When an Award will be set aside.*

I. *Arbitrator and Umpire.*

1. Persons chosen by the parties to a lease, pursuant to an agreement contained in it, for that purpose, to appraise the value of buildings erected on the demised premises during the term, are to be considered in the same light as *arbitrators*, and their appraisement has the same force and effect as an *award*. *Van Cortlandt v. Underhill*, in error, 405
2. If, by the agreement of the parties to a submission, the arbitrators have power, in case of their disagreement, to nominate an *umpire*, they may choose the *umpire* before they proceed to the consideration of the matters submitted to them. *ib.*

Vide EXECUTORS AND ADMINISTRATORS.II. *When an Award will be set aside.*

3. If arbitrators refuse to hear evidence pertinent and material to the controversy, it is such a misconduct as will vitiate the award in the Court of Chancery. *Van Cortlandt v. Underhill*, 405
4. As where persons chosen by the parties to a lease, to appraise the value of the mills and buildings erected on the premises, during the term, refused to hear evidence offered by one of the parties of the *original cost* of the buildings, this was *hld* to be a sufficient cause for setting aside the award or appraisement. *ib.*
5. So, partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts, by either of the parties, if the knowledge of such facts would have produced a different result, are sufficient causes for setting aside the appraisement or award. *ib.*

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6. So, it seems, if the assessment of damages, or the appraisement of the arbitrators be so enormous and exorbitant as to induce a belief that the arbitrators must have been corrupt, or grossly partial, their award may be set aside. *ib.*

BAIL.

Proceedings against the Sheriff.

Where a sheriff returned *cepi corpus*, &c. to a *capias ad respondendum*, and the deputy sheriff who served the writ became special bail, of which notice was sent, by mail, but not received by the plaintiff's attorney, who, *eighteen* months afterwards, ruled the sheriff to bring in the body, and, on affidavit of service, &c., moved for an *attachment*, the deputy and his sureties having, in the mean time, become insolvent, the court refused to grant the attachment, considering it unjust and unreasonable, that the sheriff should be liable to an attachment, after the plaintiff had lain by for so long a time. *Jourden v. Hawkins*, 35

BARON AND FEME.

1. A *feme covert* cannot bind herself, personally, by a covenant or contract. *Jackson, ex dem. Clowes, v. Vanderheyden*, 167
2. Therefore, a deed executed by husband and wife, with covenant of warranty, does not *estop* the wife, in an action of ejectment against her, after the death of her husband, from setting up a subsequently-acquired interest in the same land. *ib.*
3. If a *feme sole* plaintiff marries, after a report of referees in her favor, the husband must be made a party, by *scire facias*, to the judgment. *Johnson v. Parmely*, 271
4. A *feme covert*, with respect to her separate estate, is to be regarded, in a court of equity, as a *feme sole*, and may dispose of her property, with the consent or concurrence of her *trustee*, unless she is specially

restrained by the instrument under which she acquires her separate estate. *Jaques v. The Methodist Episcopal Church*, 548

5. And though a particular mode of disposition be specifically pointed out, in the instrument or deed of settlement, it will not preclude her from adopting any other mode of disposition, unless there be *negative* words restraining her power of disposition, except in the very mode so pointed out. *ib.*
6. Therefore, if she enters into any agreement clearly indicating her intention to affect by it her separate property, a court of equity, if there be no fraud or unfair advantage taken of her, will apply her separate property to satisfy such engagement. *ib.*
7. And she may give her property to her husband, as well as to any other person, if her disposition of it be not the result of flattery, or force, or improper treatment. *ib.*
8. As where the wife agreed to defray the expenses of the family establishment, the husband is not only not accountable for the moneys received by him of his wife and expended for that purpose; but is to be allowed for all advances by him for that object, and for the necessary repairs of her estate. *ib.*

BASTARD.

By the statute, (1 N. R. L. 280. sess. 36. ch. 78.) which has altered the common law, in this respect, every *bastard* child is to be deemed settled in *the place of the last legal settlement* of the mother; and it makes no difference whether that settlement is acquired by the mother, by *birth*, from her father, or *derived* to her through him, by reason of his acquiring a new settlement, she being, at the time of such change of the settlement of her father, in his family, and under age. *Overseers, &c. of Canajoharie v. Overseers, &c. of Johnstown*, 41

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *When the consideration may be inquired into.*
- II. *Demand of payment.*
- III. *Notice of non-acceptance and non-payment.*
- IV. *Liability of parties, and how discharged.*

- I. *When the consideration may be inquired into.*

1. The *consideration* of a promissory note, as between the immediate parties, may be inquired into; and if given without consideration, it is *nudum pactum ex quo non oritur actio*. *Schoonmaker v. Roosa & De Witt*, 301

II. *Demand of payment.*

2. In an action by the *payee* of a bill of exchange against the *acceptor*, where the bill is drawn *payable at a particular place*, and accepted, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed; but the defendant, if he means to avail himself of the want of a demand, must plead that he was ready, at the time and place appointed, to pay, but that the plaintiff did not come there, &c., which defence goes only to the damages and costs, and not to the cause of action. *Wolcott v. Van Santvoord*, 248

III. *Notice of non-acceptance and non-payment.*

3. If an endorser of a note be dead at the time it becomes payable, and there are executors or administrators known to the holder, notice of the non-payment must be given to them, for they represent the testator or intestate. *Merchants' Bank v. Birch's executor*, 25
4. But where a note fell due the 22d of *December*, and the endorser died at sea, on the 12th of *December* but his death was not known to the

holder until in *March* following, and the will was not proved, nor letters testamentary granted, until *April*: *Held*, that a notice of non-payment left, at the time, at the dwelling-house of the endorser, his last place of residence in *New-York*, and also sent to his family, who had, a short time before, removed into the country, was sufficient to support an action against the executors of the endorser, without showing notice to them of the non-payment. *ib.*

IV. *Liability of parties, and how discharged.*

5. Where a deed of composition was entered into between *S.* and *B.*, debtors and their creditors, by which the former assigned all their property to *M.*, and others, *in trust* for their creditors, who, by the same instrument, released *S.* and *B.* from all their debts, &c., which deed was executed by *M.* as a *trustee*, and a creditor, and who was endorser of a promissory note drawn by *S.* and *B.*, of which *B. and Sons*, partners in trade, were *holders*, described in a schedule of debts annexed to the deed as due to *M.*, and which deed was also executed by *G.*, one of the firm of *B. and Sons*; *Held*, that the execution of the deed by the *holders* of the note, was not a release of *M.*, the *endorser*, for, upon the true construction of the whole instrument, *M.* having signed as a *creditor*, as well as *trustee*, had thereby released all right of action against the makers, and was to be deemed as assenting to a discharge of the makers by the holders also, with a full understanding that his liability to them, as *endorser*, was not to be impaired. *Bruen v. Marquand*, 58

6. The plaintiff lent the defendant his promissory note, payable to the defendant, or order, who endorsed it and procured to be discounted at the Bank of *New-York*, and re-

ceived the money. The note was protested for non-payment; and the defendant being insolvent, the plaintiff signed a written agreement discharging him from all debts and demands, &c. The bank, with other creditors, also executed the agreement by its corporate seal. Afterwards, the plaintiff paid the bank, as holders, the amount of the note, and brought an action for so much money paid to his use: *Held*, that the release of the defendant by the bank, did not discharge the plaintiff, as maker, especially as the bank did not know for whose accommodation the note was discounted; and, therefore, the plaintiff did not pay the money in his own wrong. *Seymour v. Minturn*, 169.

7. Besides, the plaintiff having no debt or existing demand, at the time the agreement to discharge the defendant was executed, that agreement could not have the effect to discharge a right of action acquired subsequently, by the payment of the money to the holders of the note. *ib.*

8. Where *A.* made a note payable to the defendant or order, which was endorsed by the defendant, for the purpose of being discounted at a bank, for the accommodation of *A.*, who, on its being refused discount at the bank, negotiated it to a third person, at a discount, with knowledge of the circumstances: *Held*, that this did not amount to a fraud which could affect the rights of the holder against the maker or endorser. *Powell v. Waters*, 176

Vide BOND. EVIDENCE, VI. 9, 10, 11, 12. GUARANTY, 2. PAYMENT.

Form and requisites of a promissory note. *Vide* ASSUMPSIT, II. 6.

BOND.

An endorsement on a bond or note made by the obligee or promisee, without the privity of the obligor or promisor, is not admissible evidence of

a payment, in favor of the party making the endorsement, so as to repel the presumption of payment arising from the lapse of years, or to take the case out of the statute of limitations; unless it be first shown that the endorsement was made at the time of its date, or when its operation would be against the interest of the party making it; and then, on such proof being given, it is good evidence to go to a jury. *Roseboom v. Billington*, 182

BRIDGES.

Vide ACTION ON THE CASE, I. 3, 4, 5.

BUILDING.

Vide ACTION ON THE CASE, I. 1, 2.

CERTIORARI TO A JUSTICE'S COURT.

1. A justice's return to a certiorari is conclusive evidence of the facts stated. *Raeson v. Adams*, 130
2. But where a cause is removed from a justice's court, by *appeal*, to a court of common pleas, pursuant to the act of the 10th of April, 1818, (sess. 41. ch. 94.) the return of the justice is conclusive only as to those particulars which, by the 18th section of the act, he is required to return; and it cannot be received as evidence on the trial before the jury in the Court of C. P. of any other facts. *ib.*
3. But where the justice, in his return, further stated, that the parties before him mutually admitted certain facts which he specified; *held*, that these admissions might be considered as embraced in the words of the act requiring the justice to state "the demands of the parties and the issues joined," and that the return, so far, was admissible evidence. *ib.*

CHANCERY.

- I. *Jurisdiction.*
- II. *Answer.*
- III. *When and how Chancery will relieve.*

I. *Jurisdiction.*

1. Chancery once having had jurisdiction, will retain it; though the original ground of jurisdiction, an inability to recover at law, no longer exists. *King v. Baldwin*, in error, 384

Vide III. 6.

II. *Answer.*

2. Where an answer to an injunction bill denies all the circumstances upon which the equity of the bill is founded, on a motion for dissolving or reviving the injunction, implicit credit will be given to the answer. *Skinner v. White*, in error, 357

III. *When and how Chancery will relieve.*

3. A court of equity relieves against penalties and forfeitures where the case admits of a certain compensation. *Skinner v. White*, in error, 357
4. A. covenanted with B., in April, 1815, to make certain machinery, in one year, at a certain price, to be paid in instalments: on the 1st of August following, B. gave notice to A. that he could not go on, and that the contract was abandoned; and A. (the covenants being independent) brought an action at law against B., to recover the instalments due before the 1st of August, he having abandoned the work because of the inability of B. to pay the sums according to the agreement: *Held*, that on B.'s confessing judgment in the suit at law, with leave to A. to enter it up, the injunction which had been issued should be continued until the hearing, and that proceedings be had, either by

a reference to a master or by an issue at law, to ascertain the damages sustained by A. by the non-execution or rescinding of the contract: The *answer* of A., alleging that the instalments due on the 1st of *August*, and sued for at law, did not exceed a just compensation for their damages, in prosecuting the work to the 1st of *August*, and in the loss of their profits on the work, not being sufficient to rebut the equity on which B. relied for relief, by having, on a judicial inquiry into the facts, the damages ascertained by a master, or upon an issue of *quantum damnificatus*.

ib.

5. Chancery will not interpose to *amend* a written instrument (as a policy of insurance) on the ground of *mistake*, without the clearest and most satisfactory proof of the mistake, and of the real agreement between the parties. *Lyman v. United Insurance Company*, in error, 373

6. If there be a doubt whether a defence be available at law, and there is no doubt of the jurisdiction of a court of equity, and the defendant at law omits to make his defence there, or if he sets up a defence, which is overruled, on the ground that it cannot be made at law, equity may afford relief, notwithstanding a trial at law. *King v. Baldwin*, in error, 384

7 As where a defendant to a suit at law, being *surety* for his co-defendant, set up in his defence, that the plaintiff, though urged by the surety to prosecute, and collect the money from the principal debtor, had refused to do so, and delayed, until the principal became insolvent, which defence was overruled: the *surety* may, notwithstanding, seek relief in the Court of Chancery, on the same ground as that set up at law. *ib.*

8 A *surety*, when the debt becomes due, may come into a court of equity to compel the creditor to sue for

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and collect his debt of the principal debtor. *ib.*

9. Where a party is sued at law on notes, alleged by him to be usurious, and suffers a verdict and a judgment to be taken against him, without making any defence, or applying, in due season, to the Court of Chancery, he is concluded, and is not entitled to relief in equity.

Berry v. Thompson, 436

10. An assignment of a debt, usurious in its creation, to a third person, with knowledge of the original transaction, will not protect it from the scrutiny of a court of equity. *ib.*

Vide BARON AND FEME, STATUTES CONCERNING STEAM-BOATS.

CHARTER PARTY.

Vide FREIGHT AND CHARTER PARTY

CHATTELS.

It seems that *machinery for spinning flax and tow*, and *carding machines*, attached to the building by an upright board resting on the frames, and fastened at the ceiling, and by cleets nailed to the floor round the feet of the frames, but the machines or frames themselves not otherwise fastened to the building, are not *fixtures*, but *personal chattels*. *Cresson v. Stout*, 116

Vide EXECUTION, 6.

COASTING LICENSE.

Vide STATUTES CONCERNING STEAM BOATS.

COLLATERAL SECURITY.

Vide ASSIGNMENT.

COMMISSIONERS OF HIGHWAYS.

Vide ACTION ON THE CASE, I. 4

CONSIDERATION.

Vide BILLS OF EXCHANGE, AND PROMISSORY NOTES, I. 1.

CONSIGNOR AND CONSIGNEE.

Vide FREIGHT AND CHARTER PARTY.
FOREIGN LAWS. INTEREST, 2.

CONSTITUTION OF THE UNITED STATES.

Vide INSOLVENT DEBTORS, 4. JURISDICTION, 1. 3. STATUTES.

CONTRACT.

Vide AGREEMENT.

COSTS.

1. Where an action of trespass *quare clausum fregit* is commenced before a justice of the peace, and the defendant puts in a plea of *title* in the *locus in quo*; and the plaintiff then commences his action in the court of common pleas of the county, which the defendant removes to this court by a writ of *habeas corpus*, and on the trial, the plaintiff recovers *damages*; he is entitled to *double costs*, under the 7th section of the act of the 5th of April, 1813, (sess. 36. ch. 53. 1 N. R. L. 390.) the action being considered, after its removal into this court, as the same action originally commenced in the court below. *Bennet v. Rathbun*, 37
2. Where a suit is brought in this court, but, from the amount recovered, the plaintiff is entitled only to costs as in the *common pleas*, the plaintiff can recover only according to the existing rate of costs in the C. P. (*Vide* 41 sess. ch. 259.) 109
3. On a *scire facias* by *executors* to revive a judgment, where issue is joined on a plea of payment, and the plaintiffs are *nonsuited* at the

trial, they must pay costs. *Hogboom v. Clark*, 268

Vide INSURANCE.

COURT OF ERRORS.

1. Where the plaintiff suffered a judgment to pass against him by default on demurrer, in a case involving precisely the same question which had been before argued and decided by the court in another cause, between different parties; and, by mutual consent, a case was made and brought to this court, on a writ of error; the Court of Errors refused to hear the cause, and ordered the writ of error to be quashed. *Henry v. Cuyler*, 469
2. No question, not considered and decided in the cause in the court below, can be heard in this court, which possesses only an *appellate* jurisdiction. *ib.*
3. A writ of error will not lie upon the *order* or decision of the Supreme Court, on a motion made to set aside an execution. *Brooks v. Hunt*, 484
4. But even if a writ of error would lie in such a case; yet, if the plaintiff in error has applied for, and obtained, a writ of *audita querela*, it is a waiver of his right to bring a writ of error; for an *audita querela* is a regular suit in which the parties may plead and take issue on the merits; and, upon the judgment of the Supreme Court thereon, a writ of error may be brought to this court. *ib.*
5. An appeal from a *final* decree in a cause opens, for the consideration of the Court of Errors, all prior or interlocutory orders or decrees, in any way connected with the merits of the final decree. *Jaques v. Trustees of the Methodist Episcopal Church*, 548
6. A *final* decree is that which is made when all the material facts in a cause have been ascertained so as to enable the Court of Chancery

to understand and decide on the merits of the case. *ib.*

COURTS OF JUSTICES OF THE PEACE.

I. Jurisdiction.

II. Trial before the Justice or a Jury.

I. Jurisdiction.

1. Where a justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*, and void. *Butler v. Potter*, 145
2. But if he has jurisdiction, and errs in the exercise of it, his acts are voidable only. *ib.*
3. As where a justice, in a cause before him, of which he had legal cognizance, gave judgment for the plaintiff for more than *five dollars costs*, besides *damages*, contrary to the statute, which limits the whole amount of *costs* to be received to the sum of five dollars, the judgment and execution thereon were held to be voidable only; and that, therefore, the justice was not liable to an action of trespass, &c. and false imprisonment, at the suit of the defendant, who had been imprisoned under an execution issued on the judgment. *ib.*

II. Trial before the Justice, or a Jury.

4. Where a cause was tried by a jury before the justice, who was *half uncle to the plaintiff's wife*, the relationship was held too remote to disqualify the justice from acting. *Eggleston v. Smilcy*, 133
5. The relationship of the justice to either party, to amount to a disqualification, must be so near as to afford evidence, of itself, of partiality and fraud. *ib.*
6. Though one of the jurors, who tried the cause, was related to the plaintiff; yet, if he was not challenged at the trial, the objection cannot be afterwards made, there appearing to be no unfairness in the trial. *ib.*

COVENANT.

1. Where A. covenanted to convey to B., by a good warranty deed, a lot of land; and B. covenanted to pay A. 400 dollars in money, and 150 dollars, in *obligations*, on the execution and delivery of the deed, these are dependant covenants, and to be performed simultaneously. *Hardin v. Kretsinger*. 293
2. And B. having tendered 400 dollars in money, and two promissory notes, executed by a third person, payable to him or bearer, and not endorsed by him, amounting to 150 dollars, which A. took up and kept, throwing down, at the same time, a deed to B., which he refused to accept, but which he afterwards received; *Held*, that this was a performance on the part of B. for the payment of 150 dollars, in obligations: and that the notes were taken by A., on the original contract, as payment, on his own risk, as to the solvency of the makers, there being no fraudulent representation or concealment on the part of B., though, if there had been any fraud in this respect, the plaintiff could not have availed himself of it, in an action of covenant for the non-delivery of the obligations. *ib.*
3. The covenant of seisin extends only to a title existing in a third person, and which might defeat the estate granted by the defendant. *Fitch v. Baldwin*, 161
4. The plaintiff claimed title to lands under the *Saratoga* patent, and the defendant, claiming the same lands under the *Kayaderosseras* patent, executed a release to the plaintiff of the same land to which he claimed title. In an action of covenant brought by the plaintiff for a breach of the covenant of seisin in the defendant's deed, on the ground, that the land was, in fact, within the *Saratoga* patent, and, therefore, the defendant was not seised, &c. *Held*, that the plaintiff, by accepting the conveyance from the defendant, was es

topped from alleging that the land released to him, did not lie in the *Kayaderosseras* patent, or that the defendant was not seised of the land, in consequence of the prior seisin of the plaintiff under the *Saratoga* patent, which was the oldest. *ib.*

- 5 B., being possessed of a term of years in *England*, of which 1690 years remained unexpired, sold and assigned the same to P. for 1600 years, at a yearly rent, &c. P. sold and assigned the same to the defendant, who covenanted to perform, &c. all the covenants, &c. contained in the indenture of demise from B. to P., and on the part of P. to be performed, &c. In an action of covenant brought by P. against the defendant, to recover rent due and unpaid to B. for 24 years, the defendant pleaded, that before any rent accrued, or became due and payable to the lessor, he assigned all his interest, term, &c. to G., who entered into possession of the premises, and was accepted by B. as his tenant; *Held*, on demurrer, that the plea was bad; that the covenant, on the part of the defendant, was a positive and express covenant to pay the rent as it should become due to the lessor, and for which the plaintiff remained liable on his covenant to B. by *privity of contract*, notwithstanding the assignment by the defendant to G., and the acceptance of him by B. as his tenant. *Port v. Jackson*, 239

- 6 It is not necessary, in such case, that the plaintiff should allege, in his declaration or replication, that he had been obliged to pay the rent to B., or had been damnified; for the defendant's covenant was broken by the non-payment of the rent, and *non damnificatus* was no answer to the declaration; and the plaintiff was, therefore, entitled to recover the whole rent in arrear and unpaid, for which he was liable on his covenant with B. *ib.*

S. C. affirmed, in error, 479.

DAMAGES.

Vide ACTION, I. 1, 2. CHANCERY, III. 4.

DEBTOR AND CREDITOR.

Vide ASSIGNMENT, 2. BILLS OF EXCHANGE AND PROMISSORY NOTES, IV. 5.

DEED.

Construction of Deeds.

1. Where, in a grant of land, there is a known and well ascertained place of beginning, that must govern, and the grant must be confined within the boundaries given in the deed *Jackson, ex dem. Craigie, v. Wilkinson*, 146
2. Where the premises conveyed by a deed from M. to C. were described as follows: "to be admeasured, according to the following bounds and lines, to wit, beginning at the *south-west corner* of a tract of land, &c. granted to W. and others, &c., *thence*, extending east, along the southern boundary of the said tract, *six miles*, thence southerly, so far as by lines drawn from those two points, parallel to the eastern and western boundaries of the said tract of W. &c., will include 33,750 acres of land." And, by a prior grant of M. to others, he had cut off *two miles* of his land *east* of the south-west corner of the tract mentioned, so as to narrow the base to *four miles*: *Held*, that the line could not be extended so far south, upon other land granted by M. to O., so as to give the *quantity* of acres intended to be conveyed; though the deed to O. described the premises thereby granted, as "beginning at the south-west corner of a certain tract of land of 33,750 acres, granted, or to be granted, by M. to C." *ib.*

Vide MARRIAGE SETTLEMENT PA
TENT, I, II.

DEVISE.

Vide WILL.

DOWER.

1. Where, on application to the *surrogate*, dower has been duly *admeasured and assigned*, pursuant to the statute, (1 N. R. L. 60. sess. 10. ch. 168.) and there has been no appeal or review of the proceedings, the admeasurement, until reversed, is conclusive, in an action of ejectment brought by the widow, as to the part which she is entitled to recover. *Jackson, ex dem. Miller, v. Hiron*, 123
2. The right to *dower* rests in *action* only, and cannot be so aliened as to enable the grantee to bring an action in his own name. *Jackson, ex dem. Clowes, v. Vanderheyden*, 167
3. *Dower* cannot be recovered in an action of ejectment until it is regularly assigned. *ib.*

EJECTMENT.

- I. *Notice to quit*.
- II. *Admitting the Landlord to defend*.

I. *Notice to quit*.

1. Where A., a lessee, agreed to sell the lease to B. for a certain sum, and endorsed his name on the lease, and delivered it to B., who paid him the purchase money, and agreed to pay the rent in arrear and to become due on the lease: *Held*, that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, and that, therefore, B. was not entitled to a notice to quit. *Jackson, ex dem. Stewart, v. Kingsley*, 158
2. Where a mortgage contains a *power of sale* on default of payment of any part of the money secured to be paid; and the mortgagee proceeds under this power, and gives public notice of the sale of the

mortgaged premises, for six successive months, pursuant to the statute, this, in an action of ejectment against the mortgagor, will be deemed equivalent to six months' notice to quit, previous to the commencement of the suit. *Jackson, ex dem. Bennet, v. Lawson*, 300

II. *Admitting the Landlord to defend*.

3. The *assignee of a mortgage* may be let in to defend in an action of ejectment, as landlord, in the place of the tenant. *Jackson, ex dem. Clark, v. Babcock*, 112

Vide EVIDENCE, II. 2.

ERROR.

1. Where an execution is issued, and actually levied before the writ of error is filed, it is *no supersedeas*. *Kennie, qui tam, &c. v. Whitford*, 34
2. In a *qui tam* action, bail to a writ of error is not required by the statute, (1. N. R. L. 143.) in order to make the writ a *supersedeas*. *ib.*

ESCAPE.

Vide SHERIFF.

ESTOPPEL.

Vide COVENANT, 4.

EVIDENCE.

- I. *Private Writings*.
- II. *Confessions and Declarations*.
- III. *Presumptions*.
- IV. *Notice to produce Papers*.
- V. *Parol Evidence to explain, vary or contradict Written Instruments*
- VI. *Witnesses*.

I. *Private Writings*.

1. Where the defendant gave a written order on the plaintiff in favor of S., stating that S. wished to trade with the plaintiff for hides, to the amount of 80 or 100 dollars,

and that the defendant would be responsible for the engagements of S.; and S. endorsed on the order a receipt for hides to the amount of 100 dollars: *Held*, that the receipt so endorsed was *prima facie* evidence of the delivery of the hides, pursuant to the order. *Rawson v. Adams*, 130

Vide CERTIORARI TO A JUSTICE'S COURT, 1.

II. Confessions and Declarations.

2. An admission contained in a recital of a deed of one of the lessors, in an action of ejectment, is evidence against all of them, as he could not be called as a witness, and there was a community of interest among them. *Brandt, ex dem. Van Cortlandt, v. Klein*, 335

III. Presumptions.

Vide BOND.

IV. Notice to produce papers.

3. Where a party to a suit, pursuant to a *notice* for that purpose, produces an instrument to which he is a party, and under which he claims a beneficial interest, it is not necessary for the other party to prove its execution. *Jackson, ex dem. Stewart, v. Kingsley*, 158
4. Where the form of action, or pleadings, gives the party notice to be prepared to produce a writing or instrument if necessary, no other notice to produce it is requisite. *Hardin v. Kretsinger*, 293
5. The circumstance of the names of the subscribing witnesses to a deed being torn off, will not exempt a party from the necessity of proving the hand-writing of the party who executed it, there being no evidence that the party producing the deed had mutilated it. *Jackson, ex dem. Stewart, v. Kingsley*, 158

V. Parol Evidence to explain, vary or contradict Written Instruments.

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6. *Parol* evidence is inadmissible to show that an execution on which a levy and sale of goods had been made, had been withdrawn, and the levy abandoned by the plaintiff, in contradiction to the sheriff's deed. *Jackson, ex dem. Clowes, v. Vanderheyden*, 167
7. The proper remedy is to apply to the court to set aside the sale under the execution. *ib.*
8. Parol evidence of what a witness testified, on a former trial between the same parties, is not admissible, unless it is first shown that the witness is dead. *Powell v. Waters*, 176

VI. Witnesses.

9. A party to a negotiable note is a competent witness, in a suit on that note, to prove a fact which has arisen subsequently to his becoming a party to the note, not involving his own turpitude. *Powell v. Waters*, 176
10. By the rule, that a party to a negotiable instrument cannot be a witness to invalidate it, is understood, that a person whose name appears on such negotiable paper, shall not be admitted to say, that it was tainted with illegality or fraud, when it passed from his hands. *ib.*
11. Thus, a *second* endorser is a competent witness to prove, that the *third* endorser had said, that he had received and discounted the note at a usurious interest. *ib.*
12. A promissory note for 600 dollars, payable in six months, was given by the defendant to M., with an agreement between them, that if the defendant did not take certain goods of M., the note was to be void and returned; and M., on the same day, without the knowledge of the defendant, endorsed the note to the plaintiff, to secure a debt of 213 dollars, and the plaintiff gave a receipt to M. of the same date, promising to pay to him 187 dollars, in six months, if the note was paid; if not, then the agreement was to

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be void. The defendant gave due notice that he should not take the goods, and the note not being paid, the plaintiff, as *endorsee*, brought his action against the defendant, the *maker*; *Held*, that M., the *endorser*, was a competent witness for the defendant, to prove the consideration on which the note was given, and of its having failed, and that the plaintiff, at the time the note was endorsed to him, was informed of those facts: *first*, because by the agreement between M. and the plaintiff, the whole transaction was void, on the note not being paid, and which ought to have been returned; *second*, because M. was not called to prove the note void, at its inception, but to show that it became so, by the subsequent determination of the defendant not to take the goods, and that the plaintiff had notice of the condition on which the note was given. *M'Fadden v. Maxwell*, 188

13. Though an *attorney* or *counsel* cannot be compelled to produce a deed or instrument entrusted to him by his client, nor to disclose its date or contents, yet he may be called as a witness to prove its existence, and that it is in his possession, so as to entitle the opposite party, on his refusing to produce it at the trial, to give *parol* evidence of its contents. *Brandt, ex dem. Van Cortlandt, v. Klein*, 335

EXECUTION.

1. If a sheriff makes a levy on goods under one execution, and, afterwards, a second execution comes to his hands, the levy is sufficient for both, and he may sell the goods on the second execution, as well as on the first. *Cresson and others v. Stout*, 116
2. The sale of goods under a *fi. facias* ought to be at the place where the goods are situated, so that they may be specifically seen and examined. *ib.*
3. Where a sale was made *six miles* distant from the goods, it was held irregular and void. *ib.*
4. Selling real and personal estate, or chattels, together, without discrimination, is irregular. *ib.*
5. *Personal* property is bound from the time the execution is delivered into the hands of the sheriff. *ib.*
6. *Rye* growing in a field was levied on by a sheriff under a *fi. fa.*, but not then sold, and a *collector of taxes* afterwards distrained on and sold the *rye*, as in the possession of the debtor; *Held*, that after the levy under the execution, the *rye* was in the custody of the law, and not in the possession of the debtor, so that it could be distrained upon, and that an action could not be maintained by the purchaser under the *collector*, against a purchaser under a subsequent sale by the sheriff, who cut and carried away the *rye*. *Hartwell v. Bissel*, 128
7. The plaintiff, having a prior judgment, issued a *fi. facias* thereon, in *January*, with instructions to the sheriff "to make a levy on the property of the debtor, but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference." The sheriff did nothing, except merely to receive an inventory of the personal property of the debtor, until another execution was delivered to him in *May* following, at the suit of a subsequent creditor. *Held*, that the first execution was *dormant*, and constructively fraudulent, as against the subsequent execution. *Kellogg v. Griffin*, 214
8. Where the purchaser of goods on a sale under an execution, suffered them to remain in possession of the debtor for more than a year after the sale, without any agreement between them, or the debtor paying any thing for the use of them, but permitting him to sell some of them, and apply the proceeds to his own use, the transaction was held to be

fraudulent and void as against a subsequent creditor, under whose execution the same goods had been taken and sold. *Dickenson v. Cook*, 332

9. A mere *chose in action* cannot be taken and sold on execution. *Bogart v. Perry*, in error, 352

10. The fourth section of the statute of *uses*, (sess. 10. ch. 37. 1 *N. R. L.* 72.) rendering lands liable to execution against the *cestui que use* or *cestui que trust*, applies only to those *fraudulent* or *covenous* trusts, in which the *cestui que use* or *cestui que trust* has the whole beneficial interest in the land, and the *trustee* the mere naked or formal legal title. *ib.*

11. It is not applicable to a case where one person enters into a contract for the sale and conveyance of land to another, and the vendee pays part of the consideration, and enters into possession of the land, but neglects or refuses to pay the residue of the purchase money; for the vendor is not seised to the use of the vendee, until the *whole* consideration money is paid; and the vendee has only a mere *equitable* interest, on which a judgment at law is not a *lien*, nor can it be sold under an execution. *ib.*

Vide ERROR, 1, 2. EVIDENCE, V. 7, 8.
FRAUDULENT SALES AND CONVEYANCES, 1, 2.

EXECUTORS AND ADMINISTRATORS.

The plaintiff and the defendants, who were *executors*, agreed to submit a difference between them, as to the accounts between the plaintiff and the testator, to the award of E., and executed promissory notes to each other, signed by them, individually, for the sum of 1,500 dollars each, payable on demand, which was delivered to the arbitrator, who was to endorse his award, and the arbitrator endorsed on the note given by the defendants, his award, find-

ing a balance due to the plaintiff from the estate of the testator, of *ninety-seven* dollars and 38 cents; and also endorsed a payment so as to reduce the note to that sum, and the note was endorsed as fully paid and satisfied; in an action brought against the defendants, on the note given by them, to recover the sum so awarded, it was *held*, that the defendants were not liable *personally*, and that the action could not be maintained without proving *assets* in the hands of the defendants. *Schoonmaker v. Roosa and De Witt*, 301

Vide COSTS, 3. SLAVE.

F.

FEIGNED ISSUE.

Vide PRACTICE, III.

FEME COVERT.

Vide BARON AND FEME.

FISHERY.

1. The *Saranac* not being a *navigable* river, the erection of a *dam*, by the patentee (*Z. Platt*) of a tract of land on both sides of the river, in 1786, near the mouth of the river, by which *salmon* are prevented from passing up the river from *Lake Champlain*, is not indictable as a public *nuisance*, either at the common law, nor under the statute for the *preservation of fish in certain waters*, passed the 3d of *April* 1801, (1 *K. & R. L.* 420. sess. 24. ch. 127.) and re-enacted the 5th of *April*, 1813, (2 *N. R. L.* 238. sess. 36. ch. 62. s. 3. 3 *Rev. Stat.* 318.) which required the owners of mills or other dams which, on the 2^d of *March*, 1800, were made across any *river or creek* running into *Lakes Ontario, Erie, or Champlain*, so as to obstruct the usual course of *salmon* in going up those rivers and creeks, to alter their dams, by making *slopes* to them,

- in the manner prescribed, so that *salmon* might freely pass over the dam. *The People v. Platt*, 195
2. Those statutes ought to be construed with an implied exception of such rivers or creeks, not being navigable, as had been fully and absolutely granted by the state, without any reservation or limitation in the use of them. *ib.*
 3. And those acts, so far as they affect the rights of *Z. Platt*, the patentee, and his assigns, to the absolute and exclusive enjoyment of the *Saranac*, within the bounds of the patent to him, or impair the obligation of the contract, are unconstitutional and void. *ib.*

FIXTURES.

Vide REPLEVIN, 1, 2.

FOREIGN ATTACHMENT.

Vide PLEADING, I, 1.

FOREIGN LAWS.

Though in questions arising between subjects or citizens of different states, each is to be considered a party to the laws of his own government; yet, whether this principle is applicable to a question between principal and agent, as of a foreign merchant consigning goods to his factor here for sale, and the latter is prevented by an embargo from remitting the proceeds to his principal? *Quære. Fanning v. Consequa*, 511

Vide INTEREST, 1, 2, 3.

FORFEITURE.

Vide LEASE.

FORT NIAGARA.

Vide JURISDICTION.

FRAUD.

1. The defendant, in consideration of 25 dollars, verbally agreed to in-

demnify the plaintiff, who had subscribed to pay to the trustees of a religious society, a certain sum, annually, for the support of a minister, against any claim arising from his subscription. The plaintiff, having been sued for his subscription, and a judgment recovered against him for five dollars and 43 cents, brought an action against the defendant on his contract of indemnity, to recover the damages; *Held*, that this was a valid agreement within the statute of frauds. *Conkey v. Hopkins*, 113

2. Where the plaintiff inquired of the defendant the terms on which he would let *C.*, (his nephew,) a *news carrier*, have newspapers to sell, &c., and, on being told the terms, said, "If my nephew calls for the papers, I will be responsible for the papers he shall take." *Held*, that this was an *original* and absolute contract on the part of the defendant, and not a *collateral* agreement for the debt or default of *C.*, and, therefore, not within the statute of frauds. *Chase v. Day*, 114

Vide EXECUTION, 1, 7, 8.

FRAUDULENT SALES AND CONVEYANCES.

1. A bill of sale of goods executed to secure the vendee from his liability as endorser of a promissory note, made for the accommodation of the vendor, is not fraudulent and void, under the statute of frauds, as against an execution subsequently issued by a judgment creditor. *Weller v. Wayland*, 102
2. And if the vendee allows part of the goods comprised in the bill of sale, to remain in the possession of the grantor, or re-deliver them to him, though these goods are subject to an execution, yet the right of the vendee, as to the residue, is unimpaired, and they cannot be taken by execution. *ib.*

Vide EXECUTION, 8.

FREIGHT AND CHARTER PARTY.

1. The defendant hired the vessel of the plaintiffs, to carry a cargo from *New-York* to *P.* and back, with a return cargo to *New-York*, and covenanted to pay the plaintiffs, for the charter and hire of the vessel "from *New-York* to *P.* and back, 1,400 dollars on the delivery of the cargo at *P.*, and 1,400 dollars on the delivery of the return cargo, on the arrival of the vessel at *New-York*." The vessel proceeded with the cargo from *New-York*, and arrived in sight of *P.*, but the place being strictly blockaded by a *Portuguese* squadron, he was forbidden to enter the port; and not being instructed to proceed to any other port, the master returned to *New-York* with the cargo; and the plaintiffs offered the defendant to carry it back to *P.*, or to any port in its vicinity, as the defendant might direct; but the defendant having abandoned the cargo to the underwriters, who accepted it, declined the offer, and the cargo was, afterwards, demanded and received by the underwriters, who, as well as the defendant, refused to pay the freight; *Held*, that the plaintiffs were not entitled to any freight under the charter party; the voyage not having been performed, nor the cargo delivered according to the conditions of the agreement, on the performance of which the payment of the freight depended. *Burrill v. Cleeman*, 72
2. Where the defendant, the owner of goods, shipped them on board of the plaintiff's vessel, to be carried from *New-York* to *Liverpool*, and there delivered to *C.*, the consignee, he paying freight for the same, with primage and average accustomed, according to the bill of lading signed by the master, who, on his arrival at *Liverpool*, delivered the goods to the consignee, without receiving the freight, though he, afterwards, demanded it, but the

- payment was refused; *Held*, that the plaintiff might maintain an action for the freight against the consignee. *Barker v. Havens*, 234
3. It seems, that where the goods are not owned by the consignee, nor shipped for his account or benefit, the carrier is not entitled to call on him for the freight, on such a bill of lading. *ib.*
 4. It is the duty of the master, in all cases, to endeavor to get the freight from the consignee. *ib.*

G.

GAOL LIBERTIES.

Vide SHERIFF.

GAMING.

In an action of debt, to recover back money paid by the plaintiff to the defendant, on a *wager* between them, on a *horse-race*, under the act, (sess. 25. ch. 44. 1 *N. R. L.* 223. and sess. 24. ch. 46. s. 2, 3. 1 *N. R. L.* 452.) the plaintiff is entitled to recover no more money than the defendant has actually gained by the event of the race, though the contract was made between the plaintiff and defendant for the whole sum bet, being a much larger sum on each side, and which was nominally won by the defendant, but with whom other persons were, in fact, concerned, and contributed to make up the sum, and had received their proportions of the money won. *Zeiley v. Warren*, 192

GUARANTY.

1. The defendant, on the 3d of *October*, 1815, wrote to the plaintiff, to whom *J. H.* and *L.*, his partner, were indebted, as follows: "You will get judgment against *J. H.*, and as it is hard for him to pay it from his own pocket, I wish you to show him some lenity, as much as you think proper, for the

collection of it from *L.*, and I will, if you please, stand responsible for the payment of it, at the time you and *J. H.* may agree on." On the same day, the balance due to the plaintiff from *J. H.* and *L.* was liquidated, and *J. H.* gave his note to the plaintiff for the balance, payable, with interest, on the 1st of *October*, 1816. A suit was commenced, and judgment recovered on this note against *J. H.*, and an execution issued, which was returned *nulla bona*. It did not appear, that any notice had been given to the defendant that he was considered as a guarantor, nor of the non-payment of the debt by *J. H.*, until *January*, 1818; *Held*, that the defendant's letter to the plaintiff was not an absolute guaranty, but a proposition only to become guaranty, if the plaintiff would forbear, and give *J. H.* time for payment; and that the defendant, therefore, ought to have had notice from the plaintiff, that he accepted the guaranty so offered; and that no such notice being shown until two years after the defendant's letter was written, and when *J. H.* and his partner had become insolvent, the defendant was not liable. *Beekman v. Hale*, 134

2. *A.*, on the purchase of goods of the plaintiff on a credit, agreed to give him a note with a good endorser, or satisfactory security, and brought to the plaintiff a note made by *A.*, payable to the plaintiff or order, endorsed by the defendant in *blank*, and the plaintiff thereupon took the note, and delivered the goods to *A.* In an action brought by the plaintiff against the defendant, as *guarantee* of the note, it was *held*, that he was not liable as *guarantor*, the blank endorsement never having been filled up with an express guaranty; and, there being no proof to the contrary, it was to be intended, that the defendant meant only to become a *second endorser*, with

all the rights incident to that character. *Tillman v. Wheeler*, 326

H.

HIGHWAY.

1. A road used as a common highway, since the year 1777, but not recorded as such, is not a public highway, within the meaning of the *act relative to highways*, (sess. 36. ch. 33. s. 24.) so as to render an obstruction of it a nuisance. *The People v. Lawson*, 277
2. Where the *trustees of the village of Newburgh*, by an ordinance duly made, direct a street or road in that village, which had been used as a highway, to be shut up and discontinued, no *appeal* lies from the order or decision of the trustees to the judges of the *court of common pleas*. *ib.*
3. But if such appeal would lie, it must be made within forty days after the decision of the trustees. *ib.*

Vide ACTION ON THE CASE, I. 3, 4, 5

I.

INJUNCTION.

Vide CHANCERY, II. 2. III. 4.
STATUTES.

INSOLVENT DEBTORS.

1. A discharge under the act giving relief in cases of insolvency, passed *April*, 1813, (1 *N. R. L.* 460. sess. 36. c. 98. s. 9.) obtained the 6th of *May*, 1817, is a good bar to an action of *covenant* brought by the loan officers of *Albany*, on a covenant contained in a mortgage, to recover the balance remaining due on the mortgage, executed by the defendant under the act of the 14th of *March*, 1792, (2 *Greenl. Ed. Laws*, 400.) after a sale of the mortgaged premises, pursuant to the act, the proceeds

- of which were insufficient to satisfy the principal and interest due on the mortgage, and which, by the terms of the mortgage, were payable when demanded, at any time after the first *Tuesday of May*, 1815, it being a debt due at the time of the application for relief, on the 17th of *February*, 1817. *New Loan Officers of Albany v. Capron*, 44
2. Where the plaintiff appeared before the judge, to oppose the discharge of the defendant, under the insolvent act of the 3d of *April*, 1811, and after examining the defendant and hearing his explanations, withdrew, without making any further opposition, and the defendant obtained his discharge; the court on motion, ordered a perpetual stay of execution on the part of the plaintiff. *Field v. Howland*, 85
 3. It seems, that if the defendant had applied to the court immediately after his discharge, they would have ordered a *discontinuance* of the suit, under the circumstances of the case. *ib.*
 4. A discharge under the insolvent act of the 3d of *April*, 1811, does not discharge a debt contracted prior to the passing of the act; for the act, as impairing the obligation of the contract, would be, so far, unconstitutional and void. *Roosevelt v. Cebra*, 108
 2. And the *premium* not having been paid into court, the plaintiff, in such case, will be entitled to *interest* thereon, from the commencement of the suit, or from the time when the defendant ought to have paid the premium into court. *ib.*
 3. The allowance of *interest*, in cases of this kind, rests in the sound discretion of the court. *ib.*
 4. But the plaintiff, in such case, is not allowed *costs* on his claim for a total loss under the policy. *ib.*

INTEREST.

1. Interest is payable according to the laws of the country where the contract is made; but if, by the terms or nature of the contract, it appears, that it is to be executed in another country, or that the parties had reference to the laws of another country, then the place in which it was made is, in this respect, immaterial, and it is to be governed by the laws of the country where it is to be performed. *Fanning v. Consequa*, in error, 511
2. As, where a *Chinese* merchant, residing at *Canton*, consigned goods to a merchant in *New-York*, (and which were delivered to his agent in *Canton*,) to be sold by him, and the nett proceeds to be remitted to the *consignor* at *Canton*; *Held*, that the consignor was entitled to recover *interest* only according to the law of *New-York*, and not according to the laws or custom of *Canton*. *ib.*
3. Though in questions arising between subjects and citizens of different states, each is to be considered as a party to the laws of his country; yet, whether this principle is applicable to a question between principal and agent, as, in the above case, of a foreign merchant consigning goods to his factor here for sale, and the latter is prevented by an *embargo* from remitting the proceeds to his principal, *Quære?* *ib.*
1. Where the plaintiff declares for a total loss on the policy, and adds the usual money counts, he is entitled to judgment for a return of premium, if the court is of opinion, that he is not entitled to recover for a total loss, on the ground that the policy never attached; provided the defendants have not compelled him to elect whether he would proceed for a return of premium or not. *Waddington v. United Insurance Company*, 23

INSURANCE.

Return of Premium.

Vide INSURANCE, 3.

JUDGMENT.

Vide PRACTICE, V. 7.

JURISDICTION.

1. A state court has no jurisdiction of criminal offences against the *United States*; nor of the *penal* laws of the *United States*; nor can such jurisdiction be conferred by an act of Congress. *United States v. Lathrop*, 4
2. Therefore, an action for a *penalty* incurred by selling spirituous liquors, without a license, contrary to the act of Congress of the 2d of August, 1813, (13 Cong. 1 sess. ch. 38.) cannot be brought in this court. *ib.*
3. The right of exclusive legislation or jurisdiction within the limits of any of the states, can be acquired by the *United States*, only by purchase of territory from the states, for the purpose and in the mode prescribed by the constitution of the *United States*. *The People v. Godfrey*, 225
4. The land on which *Fort Niagara* is erected never having been actually ceded by this state to the *United States*, it still belongs to the state; and its courts have jurisdiction of all crimes committed within that *fort*, or its precincts, though it has been garrisoned by troops of the *United States*, and held by them, since the surrender by *Great Britain*, pursuant to the treaties of 1783 and 1794; for the *United States* acquired no territory within this state, by virtue of those treaties. *ib.*

Vide COURT OF ERRORS.

LEASE.

Forfeiture of Lease.

1. Where a lease for the term of seven years, contained a condition, that the lessee should not "assign over, or otherwise part with the indenture on the premises thereby leased, or

any part thereof, to any person,' &c., and a clause of re-entry, and of forfeiture, for a breach of the condition; no forfeiture is incurred by an underletting for two years, or a period short of the whole term, as the words of the condition are to be construed to mean an assignment for the whole term. *Jackson, ex dem Weldon, v. Harrison*, 66

2. Where one of the conditions was, that the lessee should pay *all taxes*, &c.; *Held*, that the lessor had no right to re-enter for a breach of the condition, without showing a demand of payment of the tax within the period required by law, in order to create a forfeiture. *ib.*
3. Nor can the lessor re-enter, on the ground of a forfeiture, for the non-payment of *rent*, without showing a demand of the rent due, on the last day, of the tenant, on the premises, a convenient time before sunset, &c., or a strict compliance with all the formalities required by the common law, his claim being regarded as *stricti juris*. *ib.*
4. Proving a demand of the *rent* of the tenant, at his house, on the premises, in the *afternoon* of the last day, is not sufficient. *ib.*
5. Where, at the bottom of a lease containing a clause of re-entry for non-performance of the covenants, conditions, &c. the lessee agreed not to make any alterations in the buildings, without the consent of the lessor, this was held to rest merely in covenant, and was not a condition for the breach of which the lease was to be forfeited. *ib.*

Vide AWARD, 1. COVENANT, 5, 6

LETTER OF CREDIT

Vide EVIDENCE, I. 1.

LEX LOCI.

Vide FOREIGN LAWS. INTEREST

LIMITATION OF ACTIONS.

1. In an action of *assumpsit* brought more than *six years* after the cause of action accrued, it is not necessary to aver a new promise within the six years; but *proof* of an *acknowledgment* of the debt within the six years, is sufficient to repel a defence set up under the statute. *Martin v. Williams*, 330
2. So, where the defendant offers to *set off* a demand against the plaintiff, which accrued more than *six years* before the bringing of the suit, it is not necessary that the defendant, in the *notice* annexed to his plea, should state a promise to pay within the six years. *ib.*
3. Nor is it an objection, that the demand offered to be set off was not originally due to the defendant, but had been assigned to him; the assignment being before the commencement of the suit. *ib.*

Vide ONONDAGA COMMISSIONERS.

LOAN OFFICERS.

Vide INSOLVENT DEBTORS, 1.

MARRIAGE SETTLEMENT.

Where a deed of marriage settlement was duly executed by the parties, and laid on the table, and the wife, the *cestui que trust*, took up the deed, and kept it in her possession until her death, this was held, under the circumstances, to be a good and valid delivery of the deed. *Jaques v. The Trustees of the Methodist Episcopal Church*, 548

Vide BARON AND FEME.

MILITARY BOUNTY LANDS.

Vide ONONDAGA COMMISSIONERS.

MILLS AND MILL-SEATS.

Vide ACTION ON THE CASE, II. 1, 2.

MORTGAGE.

Vide EJECTMENT, I. 2. II. 3.
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NEWBURGH VILLAGE.

Vide HIGHWAY.

NEWBURGH AND COCHECTON TURNPIKE COMPANY.

According to the true construction of the 10th section of the act, incorporating the *Newburgh and Cochection Turnpike Company*, (sess. 24. ch. 36. 2 K. & R. 459.) a person who owns a farm on the west side of the toll-gate, and another farm on the east side of the gate, within a mile thereof, is exempted from toll, in passing through the gate, from one farm to the other, with materials for building and improvements, it being, according to the proviso in the act, the common business of his farm. *Newburgh and Cochection Turnpike Company v. Belknap*, 33

NUDUM PACTUM.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 1.

NUISANCE.

Vide ACTION ON THE CASE, II.

ONONDAGA COMMISSIONERS.

By the *proviso* contained in the 8th section of the act to settle disputes concerning the titles to lands in the county of Onondaga, (1 N. R. L. 215. sess. 20. ch. 51.) infants have three years after coming of age, within which to file their dissent to the award of the commissioners. *Jackson, ex dem. Boyd, v. Lewis*, 475

ORDER OF REMOVAL.

Vide POOR, 2. 5.

PARTNERSHIP.

1. One partner of a firm may sign a deed of composition, and release a debt due to the partnership. *Bruen v. Marquand*, 58

2. H. and S. made a joint purchase of a quantity of goods, each paying the one half of the price. They sold to A. one package of the goods at a credit of five months, and divided the remainder of the goods between them, and H. paid S. for one half of the price of the package sold. A., the purchaser, having become insolvent, H. brought an action of *assumpsit* against S. to recover one half of the loss arising from the sale of the package; *Held*, that it was a copartnership concern, and, therefore, an action *at law* could not be maintained without proving an express promise to pay. *Sed quære. Halsted v. Schmelzel*, 80
3. But even if an action at law would lie in such a case, yet, as H. had taken the note of A., and treated it as his own, extending the time of credit, and changing the security without the consent of S., and, finally, making a compromise of the claim, he had no right call on S. to share in the loss. *ib.*
4. Where two persons are joint proprietors of certain *patent* rights, as for navigating vessels by steam, one of them, on the mere ground of such joint interest or concern, is not responsible for any special contract or undertaking entered into by the other with any *assignee* of such right, not connected with the enjoyment and exercise of their common privilege under the patent. *McNeven and others v. Livingston and others*, 437
5. A *bona fide* assignment by one of several partners, of all his interest in the copartnership stock, &c. *ipso facto* dissolves the partnership; although one of the articles of copartnership expressly provides, that the partnership shall continue until two of the contracting parties shall demand a dissolution, and the other partners, in fact, wish the partnership to go on, notwithstanding the assignment. *Marquand v. The New-York Manufacturing Company*, 525

6. The *assignee* of the partner, in such case, is entitled to an account of the profits of the concern, and to the share of the assignor; and where an *inventory* had been taken of the copartnership stock, &c., by mutual consent, six months after the assignment, and the other partners refused to deliver the share claimed by the assignee, the inventory was taken as the true valuation, though, if the stock had been sold at public auction, or private sale, the value would have been much less, and it had fallen between the time of making the inventory, and the taking of the account before a master. *ib*

Vide PAYMENT.

PATENT.

- I. *Location of Patents.*
- II. *Construction of particular Patents.*

I. *Location of Patents.*

1. Where a large tract of land was granted by the commissioners of the land office, to L. and others, describing the tract by its *exterior lines* alone; and directing a survey of the tract to be made by the surveyor-general, and patents to be issued for the several lots, according to the return and map of such survey; and the patents described the several lots with reference to the *map* on file in the office of the secretary of state; *Held*, that the patents were to be understood as referring to the *field book* and actual survey, as well as to the map on file. *Jackson, ex dem. Livingston, v. Freer*, 29
2. The owners of the several lots so surveyed, patented and described, are bound by their *actual* locations, according to the lines on the ground, without regard to the circumstance, that some of the lots would exceed, and some fall short of the quantity of acres mentioned in the patents. *ib*

Vide PARTNERSHIP, 4. DEED

II. Construction of particular Patents.

3. By the patent granted to *Zephaniah Platt*, in 1784, of a tract of land, bounded *east* on *Lake Champlain*, and extending *west* on both sides of the river *Saranac*, seven miles square; the whole river to that distance passed to the patentee, and became his exclusive property, there being no reservation of the river, nor any restriction in the use of it, expressed in the grant. *The People v. Platt*, 195
4. And the public have not, therefore, any right of *fishery* in it, within the bounds of the patent, it not being a navigable river. *ib.*

Vide FISHERY. DEED.

PARTITION.

Where the defendant in *partition*, pleaded *non tenent insimul*, on which issue was joined; and it appeared that A., one of the defendants, had, before the service of the *petition* and *notice*, conveyed all his right in the premises to one of his co-defendants, who was, before, a tenant in common with him; *The court*, after the rights of the parties had been ascertained, refused to turn the plaintiffs round to another action, on account of a *variance* between the *petition* and *proofs*, as to the *quantity* of interest in the respective tenants in common; but gave judgment, that as to A., the plaintiff should go without day, and pay his costs; but as to the other defendants, the plaintiff should have judgment according to the proofs in the cause. *Ferris and others v. Smith and others*, 221

PAYMENT.

R. and B., partners in trade, being indebted to the plaintiff for goods sold and delivered, B., on the 22d of *April*, 1816, informed the plaintiffs that they had dissolved their partnership, and that B. had assumed

the debt due to the plaintiffs, of the payment of which they might rest assured; to which the plaintiffs replied, "we observe your partnership is dissolved, and that you have assumed our debt, which we are satisfied with." B., afterwards, paid part of the debt, and on the 13th of *August*, 1816, liquidated the account, and gave the plaintiffs his promissory note on demand, for the balance due, and the plaintiffs gave him a receipt for the note, "when paid to be placed to the credit of R. and B.'s account with us." B. continued in business until *November*, 1817, when he became insolvent, and the plaintiffs, who had not sued B., nor made any demand of R., brought an action against R. and B., on the original contract for goods sold and delivered; *Held*, that neither the acceptance by the plaintiffs of the note of B., nor the indulgence shown to him, amounted to payment, or discharged R., but that the plaintiffs were entitled to recover the balance due on the original contract, on delivering up the note to be canceled. *Smith & Marshall v. Rogers & Bement*, 340

Vide ASSIGNMENT, 2. BOND.

PLEADING.

- I. *Plea of a former Action, or recovery for the same cause.*
- II. *Replication.*
- III. *Pleading in particular Actions and Cases.*

I. *Plea of a former Action, or recovery for the same cause.*

1. In an action of *assumpsit* against the maker of a promissory note (not negotiable,) it is a good plea in bar, that a judgment was recovered in the Supreme Court of the state of *Vermont*, (where the note was made, and the parties resided,) at the suit of a *creditor* of the plaintiff, on a *foreign attachment* against the plaintiff, as an absconding

debtor, to recover the amount of the same note of and against the credits and effects in the hands of the defendant, (the maker of the note,) as the *trustee and debtor* of the plaintiff. *Prescott v. Hull*, 284

2. A replication, that before the commencement of the proceedings on the foreign attachment in *Vermont*, the plaintiff *assigned and transferred* the note, &c. to A., is good; the suit here being prosecuted for the benefit of the assignee, who was not before the court in *Vermont*, nor a party to the proceedings there; it being presumed, that the court in *Vermont* would have recognized the assignee, and protected his rights, had they known of the assignment; and the proceedings there were, therefore, *res inter alios actæ*, and it is not drawing them into question, to say, that the *assignee* is not concluded by them; but such a replication ought to aver, that the debt was assigned for a full and valuable consideration, and that the suit was prosecuting for the benefit of the assignee, otherwise it is bad on demurrer. *ib.*

Vide LIMITATION OF ACTIONS, 1.

II. Replication.

3. A replication of *nul tiel record* to a plea of judgment recovered for the same cause of action in the *Circuit Court of the United States*, &c. must conclude to the country, and not with a verification. *Baldwin v. Hale*, 272

Vide PLEA. SET-OFF.

II. Pleading in particular Actions.

Vide ACTION ON THE CASE, I. 1. 5. 6.
7. BILLS OF EXCHANGE AND PROMISSORY NOTES, II. COVENANT, 5,
6. PARTITION. SLANDER, 2.

POLICY OF INSURANCE.

Vide CHANCERY, III. 5.

PRACTICE.

- I. Affidavits.
- II. Commission to examine Witnesses.
- III. Judgment as in case of Nonsuit.
- IV. Judgment by Default, Interlocutory Judgment, and Assessment of Damages.
- V. Reference.
- VI. Motions, Arguments, Cases, and Notices of Motions.

I. Affidavits.

1. An affidavit taken before a *commissioner*, an attorney of the court, and a partner in business with the attorney of the defendant, was allowed to be read, as he was not named on the record as an attorney in the cause. *Hallenback v. Whitaker*, 2

Service of Process, vide ARREST.

II. Commission to examine Witnesses.

2. Depositions of witnesses residing abroad taken under a commission, were read on the trial of a cause, and the jury, not being able to agree on a verdict, were discharged, and a *second commission* to re-examine the same witnesses was allowed to be issued. *Fisher v. Dale*, 343

III. Judgment as in case of Nonsuit.

3. Where a *feigned* issue is awarded by the court, to ascertain the validity of a judgment entered on a bond and warrant of attorney, both parties are actors, and a judgment, as in case of nonsuit, will not be granted, for not bringing the issue to trial. *Rogers v. Tift*, 267
4. A cause was regularly brought to trial, pursuant to notice, and the jury were discharged, because they could not agree on their verdict, and the judge allowed the cause to be again put on the calendar, for the purpose of being tried by another jury, but the plaintiff refused to

bring on the cause to trial, at that sittings; *Held*, that the defendant was not entitled to judgment as in case of nonsuit, for not bringing the cause to trial. *Fisher v. Dale*, 342

IV. Judgment by Default; Interlocutory Judgment, and Assessment of Damages.

5. Where one of two defendants pleads, and the other makes default, the plaintiff cannot proceed to try the issue joined, and have the damages assessed against both defendants, before an interlocutory judgment has been regularly entered against the defendant, who neglects to plead. *Hart v. Delord*, 270

V. Reference.

6. Where a cause is not referable under the statute, involving no matter of account between the parties, the court will not exercise any control over the proceedings, nor interfere to set aside the report of the referees, though they may have admitted illegal or improper evidence, and the submission, or rule of reference, has, by consent of the parties, been entered in the book of common rules. *Johnson v. Parmely*, 129
7. Where a case, not within the statute, (sess. 36. ch. 56. s. 2. 1 *N. R. L.* 516.) is referred, it seems, that a judgment cannot be entered on the report of the referees; but the remedy is by *attachment*, on making the submission a rule of court. *Yates v. Russell*, in error, 461
8. But if the parties in a suit not referable under the statute, by their written agreement, expressly consent and agree, that a rule of reference be entered, and that a judgment may be entered, on the report of the referees, all error is cured, or taken away by this consent, and a judgment on a report

of referees, pursuant to such agreement, is as valid as if entered on a verdict. *ib.*

9. Where, by agreement of the parties, a cause was referred to *three* referees, who, or any *two* of them, were to report, and two only of the referees signed the report, which stated, that the *subscribers*, having heard the proofs and allegations of the parties, find, &c., on a writ of error brought in the judgment entered on this report, it will be presumed, that all the referees met and heard the parties, though two only signed the report, nothing appearing to the contrary on the record. *ib.*
10. But if the fact were otherwise, the objection should be raised in the court below, on the coming in of the report, not in the Court of Errors, who can look only to the record. *ib.*

VI. Motions, Arguments, Cases and Notices of Motions.

11. *Attorneys*, whether sued by writ or by bill, are entitled to *persona*. service of the declaration and notices of all subsequent proceedings. *Brown v. Childs*, 1

Vide BAIL. EVIDENCE, IV. 3, 4.

PROMISSORY NOTE.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES.

POOR.

1. By the statute (1 *N. R. L.* 280. sess. 36. ch. 78.) which has altered the common law, every *bastard* child is to be deemed settled in the place of the *last legal settlement of its mother*; and it makes no difference whether that settlement is acquired by the mother by *birth*, from the father, or *derived* to her, through him, in consequence of his acquiring a new settlement, she being at the time of such change of the settlement of her father, in

his family, and under age. *Overseers, &c. of Canajoharie v. Overseers, &c. of Johnstown,* 41

2. An adjudication in an order of removal, that the pauper's *legal settlement* was in A., is tantamount to an adjudication that his *last legal settlement* was there; and the order is sufficient. *Overseers, &c. of Vernon v. Overseers, &c. of Smithville,* 89
3. Where a pauper has actually become chargeable to the town, it is not necessary to order him to remove to the place of his last legal settlement, previous to issuing a warrant for his removal. *ib.*
4. The place of birth of an infant pauper is, *prima facie*, his place of settlement; but such pauper may be removed to the last legal settlement of the parents, when discovered. *ib.*
5. Where an order is made for the removal of a pauper from A. to B., from which order the overseers of B. appeal; but the overseers of A. take back the pauper, and the appeal, consequently, is never prosecuted, the order, though unreversed, is not evidence that the pauper's settlement was in B. *ib.*

PROMISE.—*Vide* AGREEMENT, 1.

Public Agent. Vide AGENT.

RENT.—*Vide* LEASE. COVENANT, 5, 6.

RELEASE.—*Vide* ACCORD AND SATISFACTION, 2.

REFERENCE.—*Vide* PRACTICE, V.

REPLEVIN.

1. Replevin lies for any *tortious* or unlawful taking of goods; but not for things *fixed* to the *freehold*. *Cresson v. Stout,* 116
2. But if, after the sheriff has levied on them, they are severed, they then become *personal* property, and may be replevied. *ib.*

RIVER.—*Vide* FISHERY.

SCIRE FACIAS.

1. Where a judgment is above *ten*, and under *twenty* years' standing, the plaintiff must apply to the court for leave to issue a *scire facias*, supported by an affidavit of its being unpaid. *Bank of New-York v. Eden,* 105
2. If the judgment be of more than *twenty* years' standing, there must be a service of a notice of a motion, &c., or a rule to show cause, *ib.*

3. Where the judgment is above *twenty* years' standing, the court have a discretion to grant or refuse the motion for a *scire facias*. *ib.*
4. Wherever there is a change of parties by *marriage, bankruptcy* or *death*, whereby other persons become interested in the execution of the judgment, a *scire facias* is necessary to make such new person a party to the judgment. *Johnson v. Parmely,* 271
5. As where a *feme sole* plaintiff, after a report of referees in her favor, married, and a judgment was, afterwards, entered up on the report, and execution issued, without any *scire facias* being issued to make the husband a party to the judgment, the execution was set aside for irregularity. *ib.*

Vide COSTS, 3.

SET-OFF.

1. Where the defendant offers to *set off* a demand against the plaintiff which accrued more than six years before the bringing the suit, it is not necessary that the defendant, in the *notice* annexed to his plea, should state a promise to pay within six years. *Martin v. Williams,* 330
2. Nor is it an objection that the demand offered to be set off was not originally due to the defendant, but had been assigned to him, the assignment being before the commencement of the suit. *ib.*

SETTLEMENT OF THE POOR.

Vide POOR.

SHERIFF.

Where a *capias ad resp.* against a sheriff for the *escape* of a prisoner in execution, was delivered to the wife of the coroner, at his dwelling-house, (the coroner being then absent,) while the prisoner was actually off the limits of the *gaol liberties*, though he immediately thereafter returned, it is a sufficient commencement of an action against the sheriff, before the return of the prisoner to the *gaol liberties*, so as to make the sheriff liable for the escape. *Bronson v. Earl,* 63

Vide EXECUTION, 1, 2, 3.

SHIPS AND VESSELS.

Vide ARREST OF SHIPS AND VESSELS

SLANDER.

1. To say of a *blacksmith*, in relation to his business and trade, "*he keeps false*

- books, and I can prove it," is actionable.*
Burtch v. Nickerson, 217
2. Where the declaration stated that the plaintiff, at the time of publishing the slanderous words, was, and long before, had been a blacksmith, and carried on the business and trade of a blacksmith honestly, and found and provided all such iron as was necessary and required of him in his business, and made correct charges, and always kept honest, true, and faithful accounts with all persons relating to his trade, &c. Yet the defendant, in order to injure the plaintiff in his business, and cause it to be believed, &c., in a certain discourse of and concerning the plaintiff, in his said business, spoke and published the following words, &c., (stating them,) this was held sufficient, without a more special averment, that there was a discourse of and concerning the plaintiff's trade, and that the words were spoken of his trade. *ib.*

SLAVE.

The plaintiff, who had married an *executrix*, who was legatee of all the testator's property, including slaves brought with him into this state from *Virginia*, sold a slave belonging to the testator, at the time of his decease, and took a note for the consideration money, which he applied to the payment of his own debt: *Held*, that the sale was made, not in the character of an executor in right of his wife, but in his private right, as part of his property acquired by his marriage with the legatee, and was, therefore, void; especially as the sale was not necessary to pay the debts of the testator, and there was evidence of a contrivance to elude the act concerning slaves, &c. (2 N. R. L. 201.) and that no action could be maintained on the note given for the consideration money. *Helm v. Miller,* 296

STATUTES CONSTRUED, EXPLAINED, OR CITED.

1787. February 20. Sess. 10. ch. 37. (Uses,) 351
 ——— 26. Sess. 10. ch. 44. (Frauds,) 102
 1792. March 14. Sess. 15. ch. 25. (Loan officers,) 44
 1797. ——— 24. Sess. 20. ch. 51. (Onondaga Commissioners,) 475
 1798. ——— 27. Sess. 21. ch. 55. (Steam-boats,) 488

1798. August 10. Sess. 22. ch. 1. (Arrest of Ships and Vessels,) 54
 1801. March 21. Sess. 24. ch. 25. (Writs of Error—Execution,) 34
 ——— 20. Sess. 24. ch. 36. (Newburgh and Cohecton Turnpike,) 33
 ——— 21. Sess. 24. ch. 46. (Gaming,) 192
 1802. ——— 19. Sess. 25. ch. 44. (Horse Racing,) 192
 1803. April 5. Sess. 26. ch. 94. (Steam-boats,) 488
 1806. ——— 7. Sess. 29. ch. 168. (Dower,) 123
 1807. ——— 6. Sess. 30. ch. 165. (Steam-boats,) 488
 1808. ——— 11. Sess. 31. ch. 225. (Steam-boats,) 488
 1811. ——— 3. Sess. 34. ch. 123. (Insolvent Debtors,) 108
 ——— 9. Sess. 34. ch. 200. (Steam-boats,) 488
 1813. March 19. Sess. 36. ch. 33. (Highways,) 277. 339
 ——— April 5. Sess. 36. ch. 53. (Double Costs,) 37
 ——— 6. Sess. 36. ch. 62. (Fishery,) 195
 ——— 5. Sess. 36. ch. 56. (Reference,) 461
 ——— 8. Sess. 36. ch. 78. (Poor,) 41
 ——— 12. Sess. 36. ch. 98. (Insolvent Debtors,) 44
 1818. ——— 10. Sess. 40. ch. 94. (Courts of Justices of the Peace,) 130
 1819. April 7. Sess. 42. ch. 107. (Agricultural Societies,) 87

STATUTES CONCERNING STEAM-BOATS.

The several acts of the legislature of this state, granting and securing to certain persons the sole and exclusive right of using and navigating boats or vessels, propelled by steam or fire (Sess. 21. ch. 55. Sess. 26. ch. 94. Sess. 30. ch. 165. Sess. 31. ch. 225. Sess. 34. ch. 200.) in the waters of this state, are constitutional and valid acts; and an injunction may be issued by the Court of Chancery, to restrain the citizens of another state from navigating the waters of this state, by vessels propelled by steam, although such vessel may have been duly enrolled and licensed, under the laws of the United States, as coasting vessels. *Gibbons v. Ogden*, in error, 488

STATUTES OF THE UNITED STATES.

- 1813, August 2. 13 Cong. 1 Sess. ch. 38. Licenses to sell spirituous liquors, 4
 495

STATUTE OF USES.

Vide EXECUTION, 10.STEAM-BOATS.—*Vide* STATUTES
CONCERNING STEAM-BOATS.SUPERSEDEAS.—*Vide* ERROR.

SURETY.

1. Mere delay to sue the principal, does not affect the rights of the creditor against the surety. *Powell v. Waters*, 176
2. A delay, therefore, to sue the maker of a note after it has become due, does not discharge the endorser. *ib.*
3. Where a creditor does an act injurious to the *surety*, or omits to do an act, when required by his surety, which his duty towards the surety enjoins him to do, and the omission is injurious to the surety, the latter is discharged; and may set up such conduct of the creditor as a defence to a suit against him at law. *King v. Baldwin*, in error, 384
4. A *surety*, when the debt becomes due, may come into a court of equity, and compel the creditor to sue for, and collect the debt of the principal debtor. *ib.*

SURVEY OF LAND.—*Vide* PATENT, I.
1, 2.TROVER.—*Vide* EXECUTION, 6.TURNPIKE ROADS.—*Vide* NEWBURGH
AND COCHECTON TURNPIKE COMPANY.UMPIRE.—*Vide* AWARD, 2.UNITED STATES.—*Vide* JURISDICTION.USE.—*Vide* STATUTE OF USES.

USURY.

Where a note is made for the purpose of raising money, and is discounted at a higher premium than the legal rate of

interest, and none of the parties whose names are on the note could, as between themselves, maintain a suit upon it when it became payable, if it had not been discounted, the transaction is usurious, and the note void. *Powell v. Waters*, 176

Vide CHANCERY, III. 9, 10.WAGER.—*Vide* GAMING.

WILL.

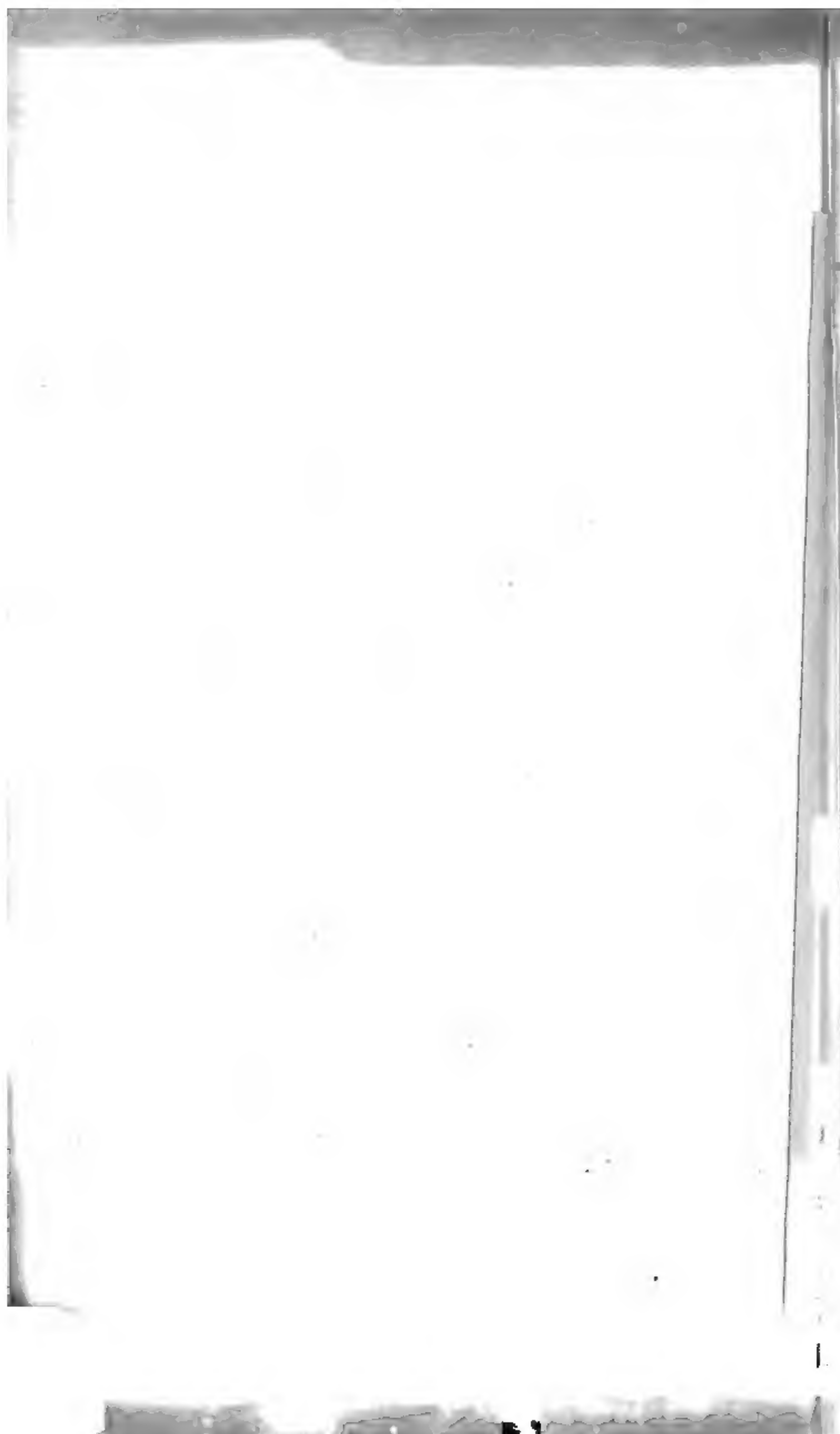
1. Where a testator, in the introductory part of his will, used these words: "And as to what worldly goods it has pleased God to endow me with, I will, and dispose of in the following manner:" and then gave his wife a third of his personal property, and the use of his house and furniture during her widowhood; and devised as follows: "I do give and bequeath to my son *Anning*, the one equal half of *my land*, beginning, &c., after he has arrived at full age; until that time, it shall belong to my wife, to make use of as she may think proper." The testator, in like manner, devised other parts of his land, &c. to his sons, but without words of inheritance, or the word estate, and gave the remaining two thirds of his personal estate to his daughters; *Held*, that *A.* and the other devisees of the land, took only an estate *for life*, under the will.
2. Where the words of a will were, "*My property*, after my debts are paid, I leave to my beloved wife *A.*, and wish her to educate my two daughters, *J.* and *G.*, with care, and to treat them with kindness and affection," without any devise or bequest, except a ring to a third person, or other words to explain or control them, they were held to pass the *whole real as well as personal estate* of the testator, to his wife, in fee. *Jackson, ex dem. Pearson, v. Howel*, 281

WITNESS.—*Vide* EVIDENCE, VI.

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